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NO. 93-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHRISSY F., By Her Next Friend And Guardian Ad Litem, DONNA MEDLEY,

Petitioner,

vs.

SEBE DALE, JR., Individually and as Chancellor for the Tenth Chancery Court District of Mississippi, GARLAND UPTON, Individually and as Referee of the Marion County Youth Court, PHILLIP BROADHEAD and FRED COOPER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Under the Rooker-Feldman doctrine, does a federal district court lack subject matter jurisdiction over a five-year-old child's federal access to courts and procedural due process claims--which arose out of an unconstitutional state court abuse proceeding--on the grounds that they are "inextricably intertwined" with either

(a) a state court divorce and custody proceeding in which the child was not a party; or

(b) the state court abuse proceeding in which the child was without meaningful representation and had no reasonable opportunity to raise her federal claims?

(2) Does a guardian ad litem ("GAL") who is employed by the state and who is appointed to represent a five-year-old child in a confidential abuse adjudication act under color of state law where the GAL does not function as an adversary to the state?

PARTIES TO THE PROCEEDING

The parties in the Fifth Circuit are those listed in the caption and the Mississippi Department of Public Welfare, Thomas H. Brittain, Jr., individually and as Commissioner of the MDPW, Marion County Welfare Department ("MCWD"), Hancock County Welfare Department ("HCWD"), Sharon Whitt, individually and as Supervisor of MCWD, and Angela Lacy, individually and as a Caseworker for MCWD.

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SEBE DALE, JR., Individually and as Chancellor for the Tenth Chancery Court District of Mississippi, GARLAND UPTON, Individually and as Referee of the Marion County Youth Court, PHILLIP BROADHEAD and FRED COOPER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Chrissy F., By Her Next Friend And Guardian Ad Litem, Donna Medley ("Petitioner" or "Chrissy") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 7, 1993.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of Mississippi ("District Court") is reported at 780 F.Supp. 1104 (S.D.Miss. 1991). The Fifth Circuit Court of Appeals' ("Court of Appeals") decision is reported at 995 F.2d 595 (5th Cir. 1993)

("Chrissy III"). Prior decisions of the Court of Appeals in this case are reported at 883 F.2d 25 (5th Cir. 1988) ("Chrissy I") and 925 F.2d 844 (5th Cir. 1991) ("Chrissy II"). All of the foregoing opinions have been reproduced in the Appendix hereto.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on July 7, 1993. A timely petition for rehearing was denied on August 9, 1993. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the following constitutional provisions and statutes:

"No person shall . . . be deprived of life, liberty, or property, without due process of law." United States Constitution, Amendment V.

"No State shall . . . deprive any person of life, liberty or property, without due process of law." United States Constitution, Amendment XIV.

"Every person who, under color of any statute . . . of any State . . . subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C §1983.

"The . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. §1738.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .." 28 U.S.C. §1257(a).

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331.

The relevant provisions of the Mississippi Youth Court Law ("Youth Court Law"), §43-21-101 et seq., are set forth in the appendix hereto.

STATEMENT OF THE CASE

I. INTRODUCTION.

This federal civil rights action involves unresolved issues of federal district court subject matter jurisdiction. These issues significantly impact the ability of child victims of sexual and physical abuse to vindicate their federal constitutional rights.

This case addresses the extent to which a federal district court may review the constitutional adequacy of child abuse and neglect proceedings in state court, and presents the Court with the opportunity to remedy the widespread uncertainty in the lower federal courts regarding the scope and application of the so-called Rooker-Feldman doctrine. Courts and legal scholars alike have recognized the need to clarify Rooker-Feldman, and the Court should do so here.

This matter also presents the issue of whether a court-appointed guardian ad litem ("GAL") acts under color of state law for purposes of §1983. Because the Court of Appeals' decision on this issue conflicts with decisions of the Court, and in order to resolve a split in the Circuits, the Court should review this issue as well.

II. THE STATE COURT PROCEEDINGS.[1]

A. The Chancery Court Proceedings.

On May 15, 1981, Dorrie Singley ("Singley") married Timothy Foxworth ("Foxworth") in Columbia, Mississippi, and the following

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[1]The District Court's findings of fact were not disputed in Chrissy III. All facts set forth herein are findings of the District Court or are otherwise undisputed in the record.

year, their daughter Chrissy was born. On November 29, 1984, Singley was granted a divorce in the Mississippi Chancery Court Cause No. 20,098, styled Dorrie Lynn Foxworth v. Timothy Charles Foxworth (hereinafter "Chancery Court Proceedings"). The Chancery Court granted Singley physical custody of Chrissy and gave Foxworth visitation rights. Chrissy, 780 F.Supp. at 1108.

In November 1986, following a visitation period with Foxworth, Singley had Chrissy examined by two doctors in Hancock County, Mississippi, who found symptoms consistent with, or suspicious of, sexual molestation; each filed a Report Of Suspected Battered Child with the HCWD. The HCWD later referred Singley to the MCWD. Id. at 1109-10. HCWD and MCWD never completed a full investigation of Chrissy's case. See id.; Transcript of Trial (June 10-14, 1991) ("TT") at 48-51, 73, 87-90, 94-95, 490-92.

Between December 17, 1986 and August 4, 1987, upon Foxworth's application, Judge Dale, who was then presiding in the Chancery Court Proceedings, ordered a modification of custody which awarded Foxworth paramount custody of Chrissy. Singley subsequently obtained new evidence of sexual abuse of Chrissy, but was unable to obtain a modification of Judge Dale's prior orders awarding custody to Foxworth. Chrissy, 780 F.Supp. at 1110. Singley refused to return Chrissy to Foxworth's custody, and went into hiding in defiance of a contempt order entered by Judge Dale. On October 14, 1987, Singley died of a brain aneurysm in New Orleans. Id. at 1110-11.

B. The Youth Court Proceedings.

Chrissy resurfaced in San Francisco in early December 1987. She was brought before the California Juvenile Court, which agreed to return Chrissy to Mississippi on the condition that certain proceedings be held on the issue of whether she had been sexually abused. On December 16, 1987, a petition was filed by the county attorney in the Marion County Youth Court ("Youth Court"), styled In The Interest of Crystal Marie ("Chrissy") Foxworth, A Child, Cause No. 1340 ("Youth Court Proceedings") which sought to have Chrissy "declared to be a neglected child." Chrissy returned to Mississippi on December 17, 1987. That day, Judge Dale issued an order in the Chancery Court Proceedings, which "held in abeyance" his custody order of August 4, 1987 and referred the matter to the Youth Court. The Youth Court (per

Referee Upton), appointed Fred Cooper and Phillip Broadhead as Chrissy's GALs in the Youth Court Proceedings. Id. at 1111-14; Plaintiff's Exhibit ("PX") 2.2.

Despite relinquishing jurisdiction the day before, on December 18 Judge Dale verbally ordered that Chrissy be examined by certain doctors. Based upon those examinations, Judge Dale directed that Chrissy be placed in the home of her paternal grandmother, Jeanette Hathorn ("Hathorn"), with unlimited visitation by Foxworth. Neither the Youth Court nor the GALs were notified of, nor were the latter present at, any of the events that took place at Judge Dale's office on December 18. No transcript was made of the events; nor was Chrissy provided with counsel. See Chrissy, 780 F.Supp. at 1112-13; see also TT 159-60.

On December 30, 1987, Referee Upton presided over the Youth Court hearing on Chrissy's petition. None of the evidence of sexual abuse was offered by any party to the Youth Court proceeding, and the Youth Court did not review it. Cooper and Broadhead made no independent attempt to obtain any evidence regarding the alleged abuse, no record was made of the hearing, and no notice had been provided to Chrissy's maternal relatives. Cooper and Broadhead raised no objections to the manner in which the Youth Court hearing was conducted at any time. Chrissy, 780 F.Supp. at 1114. The evidence also established that Chrissy was not represented by counsel (TT at 244, 291-93, 766-70); neither Foxworth, Chrissy nor Hathorn were summoned to appear personally at the hearing (TT at 294); no testimony was taken under oath at the hearing (TT at 303); and no evidence was formally admitted (TT at 307). Respondents did not dispute on appeal that these defalcations were violative of the Youth Court Law.

On December 30, 1987, the Youth Court entered judgment. Referee Upton found no evidence of sexual abuse, remanded the petition to the files and recommended that the Chancery Court modify its orders as it judged necessary to ensure that Chrissy remained in the legal custody of Foxworth, but cared for on a day-to-day basis by Hathorn. On December 31, 1987, in the Chancery Court Proceedings, Judge Dale reaffirmed his prior order awarding legal custody to Foxworth. Chrissy, 780 F.Supp. at 1114. The GALs did not appeal from the Youth Court Proceedings, and the violations of Chrissy's federal due process rights were not raised at any stage of the Youth Court Proceedings. Neither

Medley nor Chrissy's maternal relatives were given notice of the Youth Court's judgment. Indeed, the state officials involved in Chrissy's case, per the instructions of Judge Dale, withheld all information regarding Chrissy's case from Medley and any other persons who inquired as to the status of the matter. See id.; TT at 235-36; 262, 780-86; PX 30.20, 30.21

III. THE FEDERAL COURT PROCEEDINGS.

A. The First Appeal (Chrissy I).

On July 8, 1988, Petitioner filed an action pursuant to 42 U.S.C §1983 in the District Court. Petitioner alleged, inter alia, that Judge Dale, Referee Upton and Chrissy's court-appointed GALs, Cooper and Broadhead, violated Chrissy's substantive due process right of access to the courts, and deprived Chrissy, without due process, of her entitlements under the Youth Court Law.

On August 26, 1988, the District Court dismissed the action for lack of subject matter jurisdiction on the grounds that it was "inextricably intertwined" with the Chancery Court and Youth Court Proceedings. Record on Appeal ("RA") 292-97. Petitioner appealed that dismissal, and the parties extensively briefed all issues related to subject matter jurisdiction. On September 11, 1989, the Court of Appeals reversed and remanded. Chrissy F. By Medley v. Miss. D. of Public Welfare, 883 F.2d 25 (5th Cir. 1989).[2]

B. The Second Appeal (Chrissy II).

On remand and after an evidentiary hearing conducted in December 1989, the District Court appointed Medley as Chrissy's "Next Friend." At the hearing on Medley's appointment, the District Court admonished "that the issue of whether or not Chrissy has been sexually abused, and if so what should be done about it, is not . . . and will not be before this Court." Medley Petition Hearing Transcript (December

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[2]The Court of Appeals directed, inter alia, that the District Court "appoint a guardian ad litem or next friend who qualifies under Mississippi law or enter a finding that Chrissy's interests are adequately protected without such an appointment," and that the District Court's "primary concern on remand should be to assure that Chrissy's interests in vindicating her statutory and constitutional rights are properly protected." Id. at 27.

12 & 13, 1989) at 246-47. In March 1990, Judge Dale, Referee Upton and other defendants filed motions to dismiss asserting, inter alia, Eleventh Amendment and personal immunity defenses. RA 1029-30. The District Court denied in part, and granted in part, the motions to dismiss. Judge Dale, Referee Upton, Cooper and Broadhead remained defendants, subject only to Petitioner's federal claims for prospective injunctive and declaratory relief. See RA 1055-71. On interlocutory appeal, the Court of Appeals affirmed. Chrissy F. By Medley v. Mississippi DPW, 925 F.2d 844 (5th Cir. 1991).

C. The District Court's Findings Of Fact And Conclusions Of Law.

A five-day bench trial was held in June 1991. Pursuant to its prior ruling, the District Court refused to admit evidence of Chrissy's abuse for the purpose of establishing that she was abused. See TT at 722-23; see also TT at 410, 751, 754, 903, 956, 957. On December 6, 1991, the District Court filed its findings of fact and conclusions of law. Chrissy, 780 F.Supp. at 1104. The District Court did not address or decide the issue of whether or not Chrissy had been sexually abused prior to her return to Mississippi, nor any other claims or issues addressed or decided in the Chancery Court or Youth Court Proceedings. See id. at 1104-31. The District Court did rule, however, that Judge Dale violated Chrissy's right of access to the courts by ordering--without having jurisdiction to do so--physical and psychological examinations of Chrissy which served as a basis for changing her legal and custodial status. Id. at 1126. The District Court also found that Judge Dale's proceedings "failed to provide Chrissy with adequate, meaningful access to a court proceeding." Id at 1127. The District Court reasoned that because Judge Dale did not notify Chrissy's GALs, and made no record of the hearing, "Judge Dale did not afford Chrissy an opportunity to protect her legal interests." Id.

The District Court similarly found that Upton violated Chrissy's right of access to the courts by failing to make a record of the proceedings and by neither admitting nor considering crucial evidence of abuse. Id. The District Court also found that the Youth Court hearing was a pretext to facilitate the enforcement of Judge Dale's prior orders, "fell woefully short of those basic features which mark an adequate adjudicatory proceeding" and that, "[a]t a minimum, a complete record of this proceeding should have been made to ensure that an adequate

appeal of the youth court judgment could have been made." Id. The District Court also expressly found that "Upton failed to ensure that Chrissy was afforded meaningful representation and should have been aware during the course of the youth court proceeding that the [GALs] were not sufficiently discharging their duties to their client or the court." Id. The District Court, therefore, held Referee Upton "liable for continuing to adjudicate Chrissy's legal rights in light of the obvious lack of representation that was being afforded to a small child who was otherwise unable to protect herself." Id.

The District Court also found that Mississippi's Youth Court Law creates entitlements to the appointment of a GAL, representation by counsel at all stages of the proceeding, the making of a record and the right to introduce evidence controverting the contents of other reports admitted into evidence. Id. at 1128-29. The District Court found that Referee Upton deprived Chrissy of the foregoing entitlements without due process when he failed to have a record made, "failed to ensure that her interests were adequately protected by [her court-appointed representatives] and effectively denied her right to present evidence on her behalf as established under Mississippi law." Id. at 1129. Indeed, the District Court expressly found that Chrissy's GALs, Cooper and Broadhead, did not afford Chrissy "meaningful representation," and that during the Youth Court proceeding, they "were not sufficiently discharging their duties to [Chrissy] or the court." Id. at 1127.

The District Court ordered that Referee Upton, in his capacity as Youth Court referee, "hold a new youth court proceeding for the benefit of [Chrissy] regarding the allegations of sexual abuse," which "conform[s] to all statutory requirements and constitutional protection to which Chrissy is entitled." Id. at 1131. Chrissy's custodial status was unaffected by the District Court's ruling. The District Court dismissed Cooper and Broadhead on the grounds that they did not act under color of state law. Id. at 1116.

D. The Third Appeal (Chrissy III).

Judge Dale and Referee Upton appealed, arguing that the District Court lacked subject matter jurisdiction and that the injunctive relief ordered by the District Court was barred by the Eleventh Amendment. Neither Judge Dale nor Referee Upton challenged any of the District Court's findings or conclusions of law on the merits of Petitioner's

claims. Petitioner cross-appealed against Cooper and Broadhead, among others.

On July 7, 1993, the Court of Appeals reversed and rendered judgment in favor of Judge Dale and Referee Upton. Chrissy F. By Medley v. Ms. Dept. of Public Welfare, 995 F.2d 595 (5th Cir. 1993).[3] The Court of Appeals, citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983), reasoned that Chrissy's federal claim, "insofar as it seeks a new adjudication of Chrissy's alleged abuse and custody, is 'inextricably intertwined' with the [Chancery Court's and Youth Court's] rulings"; and that the District Court lacked "jurisdiction to grant injunctive relief against [Judge] Dale and [Referee] Upton in this case." Chrissy III, 995 F.2d at 600. In applying the "inextricably intertwined" test, the Court of Appeals first noted that Chrissy's federal claims do not "'mount a general challenge to the constitutionality' of a statute or rule." Id. at 599 (quoting Feldman, 460 U.S. at 483). The Court of Appeals then compared "the relief [Chrissy] sought and obtained in federal court against Dale and Upton [with] . . . that available if direct appeal had been taken in state court." Id. The Court of Appeals claimed that because the relief obtained in the District Court could have been obtained on appeal in the state court proceedings, the actions were "inextricably intertwined." Id. The Court of Appeals acknowledged that Chrissy's federal due process claims were neither addressed nor decided in the state court proceedings, but held Medley, the GALs and other unidentified "interested persons" accountable for having failed to raise those claims in or on appeal from the Chancery Court or Youth Court Proceedings. Id. The Court of Appeals also rejected Petitioner's law of the case arguments. Id. at 600. After the denial of Medley's petition for rehearing and suggestion for rehearing en banc, this Petition followed.

IV. BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT.

Federal jurisdiction in the District Court is proper pursuant to 28 U.S.C. §1331 and 1343(3). Chrissy's due process claims against Judge

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[3]The Court of Appeals also affirmed the District Court's dismissal of Cooper and Broadhead.

Dale, Referee Upton, Cooper and Broadhead arise under 42 U.S.C. §1983 and the U.S. Constitution, Amendment XIV. See also Reasons For Granting The Writ, infra.

REASONS FOR GRANTING THE WRIT

I. THERE IS CONFLICT AMONG THE COURTS OF APPEAL AS TO THE APPLICATION AND SCOPE OF THE ROOKER-FELDMAN DOCTRINE.

A. Summary Of Argument.

The Rooker-Feldman doctrine has resulted in a significant degree of conflict among and within the courts of appeal as to the scope of federal district courts' subject matter jurisdiction over federal claims arising out of state court proceedings. There is confusion as to the application and scope of the Court's "inextricably intertwined" test set forth in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and the Fifth Circuit's application of the Rooker-Feldman doctrine substantially differs from that applied by other courts of appeal. To insure the lower federal courts' uniform application of the Rooker-Feldman doctrine, the Court should grant the Petition and clarify the applicable standard.

B. The Rooker-Feldman Doctrine.

Under 28 U.S.C. §1257(a), "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .." Although district courts are without such authority, they have mandatory "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. The Rooker-Feldman doctrine, which derives from the Court's decisions in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Feldman, supra, attempts to draw the line between the Court's appellate jurisdiction, and federal district courts' "original" jurisdiction.

In Rooker, plaintiffs sued in federal district court seeking to have a state court judgment, which had been affirmed by the Supreme Court of the state, "declared null and void." 263 U.S. at 414. Plaintiffs claimed that the state court judgment "gave effect to a state statute" that

violated the Constitution. The district court dismissed for lack of subject matter jurisdiction. The Court affirmed, reasoning that if an issue "actually arose" and was decided in a state court proceeding, a district court's review of that issue is an impermissible exercise of the "appellate" jurisdiction vested solely in the Court. See id. at 415-16.

In Feldman, plaintiffs filed petitions with the District of Columbia ("D.C.") Court of Appeals (i.e., the equivalent of the highest court of a state), seeking waivers of the D.C. bar's requirement that members graduate from accredited law schools. The D.C. Court of Appeals denied the petitions. Plaintiffs filed actions in federal district court, asserting that the denials violated federal law. The district court dismissed both actions for lack of subject matter jurisdiction. Feldman, 460 U.S. at 470, 473. The U.S. Court of Appeals for the District of Columbia reversed on the grounds that the waiver proceedings were not "judicial" proceedings and therefore did not foreclose federal litigation of the constitutional claims. Id. at 474.

After determining that the waiver proceedings were judicial in nature, the Court determined that "to the extent that [plaintiffs] sought review in the District Court of the [state court's] denial of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints." Id. at 482. The Court reasoned that

> "[i]f constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision." (Id. at 483 n.16.)

The Court did not set forth a general standard for determining when federal claims are "inextricably intertwined" with a state court judgment. It did, however, find a distinction between "general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission." Id. at 485. In "general challenges," the district court "assess[es] the validity of a rule promulgated in a nonjudicial proceeding." Id. at 486. A "particular" challenge, on the other hand, would involve a review of the constitutionality of a judgment "'denying a particular application for admission to the [state bar].'" Id. at 485 (quoting Doe v. Pringle, 550 F.2d 596,

599 (10th Cir. 1976), cert. denied, 431 U.S. 916 (1977)); emphasis and brackets in original. Based upon the foregoing distinction, the Court held that "[t]o the extent that [plaintiffs] mounted a general challenge to the constitutionality of [the accreditation rule]," the district court had subject matter jurisdiction. Feldman, 460 U.S. at 482-83.

The Court also addressed the impact of a plaintiff's failure to raise a federal claim in the state court proceeding:

> "[T]he fact that we may not have [certiorari] jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States district court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court." (Id. at 482 n.16.)

One commentator has noted that, under the foregoing, if the Court lacks certiorari jurisdiction over plaintiff's federal claims because they were not raised in the state court proceeding, and those federal claims are considered "inextricably intertwined" with the state court judgment, plaintiff will be unable to obtain federal "appellate" review.[4] However, if plaintiff fails to raise his federal claims, but they are not "inextricably intertwined" with the state court judgment, the federal district court would be able to exercise its "original" jurisdiction over the claim. See Feldman, 460 U.S. at 486; Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993); 28 U.S.C. §1331. Thus, although plaintiffs in Feldman failed to raise their "general challenges" in state court, they did not "forfeit" their right to obtain review thereof because those claims were not "inextricably intertwined" with state court rulings.

The determination of the extent to which a federal claim is "intertwined" with a state court judgment is of critical importance to Section 1983 plaintiffs who seek to challenge the constitutionality of a state court proceeding in federal court. However, as numerous courts and scholars have acknowledged, the precise meaning of "inextricably

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[4]Note, The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts, 42 Rutgers L. Rev. 859, 876-77 (1990).

intertwined" remains unclear, and this has resulted in conflict and inconsistencies.[5]

C. Conflicting Decisions And Applications Of The Courts Of Appeal.

The lower federal courts' interpretations and applications of the Rooker-Feldman doctrine are in disarray. While many courts of appeal--including the Fifth Circuit here--mechanically distinguish between "general challenges" and "particular" applications,[6] numerous others have either disregarded Rooker-Feldman, narrowed its scope, or applied different tests altogether. As discussed below, this non-uniform application of the Rooker-Feldman doctrine has resulted in disparate treatment of plaintiffs' federal constitutional claims in the lower federal courts.

In determining whether federal claims arising out of state court proceedings could be asserted in a federal district court, courts of appeal

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[5]See Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1433 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (the inextricably intertwined "language by itself does not provide district courts with a bright line rule"); Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986) ("This distinction between a permissible general challenge and an impermissible appeal . . . may be subtle, and difficult to make."); Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993) ("There is, unfortunately, no bright line that separates a federal claim that is 'inextricably intertwined' with a state court judgment that is not so intertwined"); see also Note, supra, 42 Rutgers L. Rev. at 879, 918 ("The scope of the Rooker-Feldman doctrine has always been ambiguous"); M. Finch and J. Kasriel, Federal Court Correction of State Court Error: The Singular Case on Interstate Custody Disputes, 48 Ohio St. L. J. 927, 975 (1987) ("There remain . . . aspects of the Rooker-Feldman doctrine that are not authoritatively resolved by the Court's decisions"); Note, Texaco, Inc. v. Pennzoil Co.: Beyond a Crude Analysis of the Rooker-Feldman Doctrine's Preclusion Of Federal Jurisdiction, 41 U. Miami L. Rev. 627, 629 (1987) ("confusion abounds as to exactly what the [Rooker-Feldman] doctrine is, and an analysis of cases, statutes, and commentary reveal numerous inconsistencies"); W. Chang, Rediscovering The Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts, 31 Hastings L.J. 1337, 1350 (1980) ("the scope of the Rooker preclusion of claims and issues has been often misunderstood").

[6]See Chrissy III, 995 F.2d at 599; Ritter v. Ross, 992 F.2d at 754 (7th Cir. 1993); Czura v. Supreme Court of South Carolina, 813 F.2d 644, 646 (4th Cir. 1987); Reed v. Terrell, 759 F.2d 472, 473 (5th Cir.), cert. denied, 474 U.S. 946 (1985); Razatos v. Colorado Supreme Court, 746 F.2d at 1433 (10th Cir. 1984).

within the Third, Fifth, Ninth and Tenth Circuits have either expressly or implicitly ignored the Rooker-Feldman doctrine.[7] In general, these courts simply equate the Rooker-Feldman doctrine with principles of claim and issue preclusion (see e.g., Robinson, 753 F.2d at 1472), and give the state court judgment the full faith and credit to which it is entitled under 28 U.S.C. §1738.[8] Indeed, commentators view claim and issue preclusion and Rooker-Feldman as identical in scope and agree that the "jurisdictional doctrine seems unnecessary and potentially mischievous," and that "it would be better to go straight to the res judicata rules that justify preclusion." 18 C. Wright, A. Miller and E. Cooper, Federal Practice And Procedure, §4469 at 665-66, 668 (1981); see also Note, supra, 42 Rutgers L. Rev. at 861, 912-19, 914 n.281; Chang, supra, 31 Hastings L.J. at 1354.

Instead of "going straight to res judicata," other circuits have continued to apply the Rooker-Feldman doctrine, but have expressly incorporated principles of claim and issue preclusion into the determination of whether a federal claim is "inextricably intertwined" with a state court judgment. These courts have held that (1) federal claims of a non-party to state court proceedings are not "inextricably

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[7]See Lewis v. East Feliciana Parish School Bd., 820 F.2d 143, 146 (5th Cir. 1987); Gauthier v. Continental Diving Services, Inc., 831 F.2d 559, 561 (5th Cir. 1987) ("[declining] to apply Rooker-Feldman in a way that would require a federal court to give greater deference to a state court judgment than a court of the state in which the judgment was rendered would give it"); McWilliams v. McWilliams, 804 F.2d 1400, 1401 (5th Cir. 1986); Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986) ("we view the res judicata requirement of full and fair opportunity to litigate, and the Feldman 'inextricably intertwined' barrier to federal jurisdiction as two sides of the same coin"); DeVargas v. Montoya, 796 F.2d 1245, 1248-49 (10th Cir. 1986) (applying principles of claim preclusion despite prior state court judgments on same claims); see also Randolph v. Lipscher, 641 F.Supp. 767, 781 n.8 (D.N.J. 1986) (arguing that application of a complex 'inextricably intertwined' test is no longer necessary in light of Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984); the court simply applies res judicata principles).

[8]28 U.S.C. §1738 provides that "[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

intertwined" with the state court's judgment;[9] and (2) federal claims of a party to state court proceedings are not "inextricably intertwined" with the state court's judgment if the party did not have a reasonable opportunity to raise the federal claims in the state court proceeding.[10]

The foregoing conflicts with the decisions of other courts of appeal to the extent those courts have interpreted Rooker-Feldman as a jurisdictional bar to district court review of any "particular" application of a rule or procedure. The conflict between the unbending requirement that the challenge be "general" by some courts of appeal, and others' consideration of principles of claim and issue preclusion, is aptly demonstrated in this case. Here, the Court of Appeals disregarded the fact that Chrissy was not a party to the Chancery Court Proceedings. The Court of Appeals, similarly, disregarded the fact that Chrissy did not have a reasonable opportunity to raise her federal claims in the Youth Court Proceedings. The Court of Appeals instead found Rooker-Feldman barred Chrissy's claims because she raised no "general challenges" and because she purportedly forfeited her federal claims by failing to raise them in the state court proceedings. See Chrissy III, 995 F.2d at 599.

In applying the Rooker-Feldman doctrine, the Second and Ninth Circuits have held that a federal claim is not "inextricably intertwined" with a state court proceeding if it is collateral to the merits.[11] Indeed,

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[9]See Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 629 (1st Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 865 (1992); Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992); Leaf v. Supreme Court of State of Wis., 979 F.2d 589, 597-98 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2417 (1993); McCurry v. Tesch, 738 F.2d 271, 274 n.3 (8th Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

[10]See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1144-45 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987); Guess v. Board of Medical Examiners of State of N.C., 967 F.2d 998, 1004 (4th Cir. 1992); Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554, 564-65 (7th Cir. 1986); Robinson, 753 F.2d at 1472 (9th Cir. 1985); Wood v. Orange County, 715 F.2d 1543, 1546-47 (11th Cir. 1983); cert. denied, 467 U.S. 1210 (1984).

[11]See Texaco v. Pennzoil Co., 784 F.2d at 1144; Thomas v. Bible, 694 F.Supp. 750, 758 (D.Nev. 1988), aff'd, 896 F.2d 555 (9th Cir. 1989) (district court has jurisdiction to examine "compliance with statutory procedures for the express purpose of determining whether or not plaintiff's constitutional rights were violated"); see also Centifanti v. Nix,

the Second Circuit expressly rejected the argument that Rooker-Feldman "preclude[s] federal review of issues which a party could have raised in the state court proceeding, but chose to withhold from the state court." Pennzoil, 784 F.2d at 1144. In Pennzoil, a state court jury had found that Texaco had knowingly and intentionally interfered with a pending agreement between Getty Oil Co. and Pennzoil, and awarded compensatory and punitive damages of approximately $11 billion. Id. at 1136. Texaco raised numerous constitutional objections to the state court judgment in an unsuccessful motion for judgment notwithstanding the verdict. See id. at 1139, 1143 n.7.

Texaco then filed an action in federal court to enjoin Pennzoil's enforcement of the judgment. Id. Texaco, inter alia, challenged the judgment as unconstitutional on various grounds, but also claimed that the Texas lien and bond provisions were unconstitutional.[12] In ruling that the latter claims were not barred under the Rooker-Feldman doctrine, the Second Circuit stated that "[t]hose claims have never been presented to or adjudicated by a state court, [and] are [not] 'inextricably intertwined' with the barred claims." Id. at 1144. The Second Circuit also noted that the adjudication of the constitutionality of the Texas bond and lien provisions "is not a collateral attack on the merits of the Texas judgment," and that Texaco "does not have a fair opportunity to seek and obtain a timely final resolution of those claims from the Texas courts and the Supreme Court before it will suffer irreparable harm . . . ." Id. at 1144-45.

By reversing on abstention grounds, the Court implicitly found subject matter jurisdiction present, and a majority of its members, in concurring opinions, expressed the belief that Rooker-Feldman did not bar Texaco's claims. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 18, 21, 25-26, 28, 31 n.3 (1987). Justice Scalia believed that because "the [Supreme] Court need not decide any issue either actually litigated in the Texas courts or inextricably intertwined with issues so litigated," the

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865 F.2d 1422, 1430 (3d Cir. 1989).

[12]Texaco alleged that because those provisions prevented it from effectively prosecuting appeals to the Texas Court of Civil Appeals, the Texas Supreme Court, and eventually to the U.S. Supreme Court under 28 U.S.C. §1257(2), they were void under the Supremacy, Due Process and Equal Protection Clauses of the U.S. Constitution. Pennzoil, 784 F.2d at 1139.

Rooker-Feldman doctrine did not deprive it of jurisdiction to decide "Texaco's challenge to the constitutionality of the Texas stay and lien provisions." Id. at 18 (Scalia and O'Conner, JJ., concurring). Justice Brennan, similarly, believed that the Rooker-Feldman doctrine did not bar Texaco's claims, reasoning that

> "Texaco filed the §1983 action only to protect its federal constitutional right to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit. Texaco's federal action seeking a stay of judgment pending appeal is therefore an action 'separable from and collateral to' the merits of the state-court judgment."[13]

Justice Marshall, on the other hand, believed that jurisdiction was lacking. Id. at 25. Justice Marshall first articulated the rule "that the federal claim is inextricably intertwined with the state-court judgement if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Id. He then reasoned that "[b]ecause determination of Texaco's claim for an injunction necessarily involved some review of the merits of its state appeal, Texaco's constitutional claims were inextricably intertwined with the merits of the Texas judgment."[14]

Pennzoil conflicts with the decisions of other courts of appeal to the extent those courts have interpreted Rooker-Feldman as a jurisdictional bar "to an examination of the rule as applied by the state court to the particular factual circumstances of [the plaintiff's] case." Razatos, 746 F.2d at 1433. The Second Circuit in Pennzoil addressed the merits of the constitutional adequacy of the bond and lien provisions as applied to Texaco. See id. at 1152-54. In sum, the Second Circuit,

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[13]Id. at 21 (quoting National Socialist Party v. Skokie, 432 U.S. 43, 44 (1977)) (Brennan and Marshall, JJ., concurring). Justice Blackmun separately agreed with Justice Brennan (Pennzoil, 481 U.S. at 28 (Blackmun, J., concurring)) and Justice Stevens, agreeing with Justices Scalia and Brennan, similarly expressed the belief that the Rooker-Feldman doctrine did not bar "the federal courts from considering Texaco's claims." Id. at 31 n.3 (Stevens, J. concurring).

[14]Id. at 26; emphasis in orig. Justice Marshall acknowledged, however, that "the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer . . .." Id. at 25.

with implicit approval of the Court, found that jurisdiction was proper as long as the federal district court does not review the merits of claims actually litigated in state court. However, this interpretation of Rooker-Feldman conflicts with Justice Marshall's opinion that if any review of the merits is necessary, Rooker-Feldman bars jurisdiction.

In other cases, the Third and Fifth Circuits have assessed the extent to which federal claims are "intertwined" with state court judgments by examining the nature of the relief sought in the federal district court.[15] The Third Circuit has held that where plaintiff "requests an injunction ordering the state court to correct alleged constitutional defects in the procedural rules applied in reaching [a] decision . . ., such relief, if granted, could affect future decisions of the state supreme court, [and] would not require review of a past decision."[16] In Chrissy III, however, the Fifth Circuit applied a much broader rule, and required Petitioner to show that the relief she obtained in federal court could not have been obtained in the state court proceedings. See 995 F.2d at 599. In contrast, in Carbonell v. La. Dept. of Health & Human Resources, 772 F.2d 185, 188-89 (5th Cir. 1985), the Fifth Circuit stated that the Rooker-Feldman doctrine

> "teaches that the nature of the underlying claim, not the nature or basis of the desired relief, directs the answer to the appellate versus original jurisdiction inquiry. . . . Feldman directs the inquiry away from a mechanical classification of the relief requested or the cause of action, toward a realistic consideration of the nature of the underlying claim."

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[15]Valenti v. Mitchell, 962 F.2d at 297 (3d Cir. 1992); Centifanti v. Nix, 865 F.2d at 1429-30 (3d Cir. 1989); Chrissy III, 995 F.2d at 599.

[16]Centifanti, 865 F.2d at 1430. Indeed, one commentator has suggested that the Court's appellate jurisdiction is not triggered by federal claims arising out of "the procedural manner in which the [state] system treats a litigant." Chang, supra, 31 Hastings L.J. at 1347. Professor Chang has explained that "[s]ince the manner in which the system treats a litigant could constitute a separate claim; claims based on procedural abuses should not be dismissed under Rooker. Federal court challenges to the substantive determinations of state court decisions . . ., however, are impermissible under Rooker." Id.; emphasis added.

The foregoing demonstrates the need for the Court's supervision and guidance of the lower federal courts regarding the scope of the Rooker-Feldman doctrine. Petitioner's case provides an opportunity for the Court to address many of the issues discussed above. For example, the Court of Appeals mechanically required "generalized challenges" without regard for the fact that Chrissy was not a party to the Chancery Court Proceedings and did not have a reasonable opportunity to litigate her federal claims at any stage of the Youth Court Proceedings.

Despite the fact that the District Court did not address the merits of the Youth Court proceeding (i.e., the issue of sexual abuse), and did not effect a reversal of the Youth Court's judgment or alter Chrissy's custodial status, the Court of Appeals required Petitioner to distinguish between the relief she obtained in federal court, and that which she could have obtained in the state court proceedings.

By addressing the foregoing issues, the Court will provide the lower federal courts with much needed clarification as to the scope of the Rooker-Feldman doctrine.

II. THE COURT OF APPEALS' APPLICATION OF THE ROOKER-FELDMAN DOCTRINE CONFLICTS WITH DECISIONS OF THE COURT.

A. Summary Of Argument.

The Youth Court did not actually consider and decide Chrissy's federal claims, and Chrissy did not have a full and fair opportunity to litigate those claims therein. The Court of Appeals' judgment, therefore, effectively barred Chrissy from litigating her federal claims in any forum and conflicts with decisions of the Court.

B. Issue And Claim Preclusion.

The statutory principle upon which the Rooker-Feldman doctrine is founded, namely, the Court's appellate jurisdiction set forth in 28 U.S.C. §1257(a), applies only to "[f]inal judgments." In the absence of such "appellate" jurisdiction, a federal district court has "original" jurisdiction over federal claims. Feldman, 460 U.S. at 486; 28 U.S.C. §1331. The Court, however, can give no greater preclusive effect to a state court judgment than that given by the highest court of the state.

See Haring v. Prosise, 462 U.S. 306, 314 n.6 (1983). "If the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy' under [28 U.S.C. §1738]." Id. at 314 n.6 (quoting Union & Planters' Bank v. Memphis, 189 U.S. 71, 75 (1903)).

The Court has repeatedly recognized limitations on the preclusive effect of state court decisions; i.e., those principles are not applicable "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." Kremer v, Chemical Const. Corp., 456 U.S. 461, 480-81 (1982); see also Haring, 462 U.S. at 313-14; Allen v. McCurry, 449 U.S. 90, 95 (1980). Indeed, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Kremer, 456 U.S. at 481. Moreover, the Court has recognized that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 2184 (1989). As discussed below, the decision of the Court of Appeals conflicts with the foregoing decisions of the Court.

C. The Fifth Circuit's Conflicting Decision.

Chrissy was not a party to the Chancery Court Proceedings. Therefore, she cannot be bound by any judgment entered therein under principles of issue preclusion, claim preclusion or the Rooker-Feldman doctrine. See Martin, 490 U.S. 755, 109 S.Ct. at 2184. The District Court enjoined Referee Upton to conduct a new hearing in the Youth Court on the issue of abuse which was to conform to the requirements of due process. This judgment was based upon the finding that five-year-old Chrissy was denied meaningful representation by her Youth Court-appointed GALs. The District Court also found that the Youth Court violated due process because it adjudicated Chrissy's rights in the absence of meaningful representation. Neither Judge Dale, Referee Upton, Cooper nor Broadhead argued in the Court of Appeals that Chrissy's access to the Youth Court was adequate, effective and meaningful. Because that finding was undisputed, it is apparent that Chrissy did not have a full and fair opportunity to litigate, among others, her federal due process claims purportedly barred by the Rooker-Feldman doctrine.

In the absence of a "full and fair opportunity" to litigate her federal claims, the Court of Appeals was not permitted to give final, preclusive effect to the Youth Court judgment. See Haring, 462 U.S. at 314 n.6; Kremer, 456 U.S. at 480-81. In the absence of a final state court judgment as to Chrissy's federal claims, this Court's appellate jurisdiction under 28 U.S.C. §1257 was not triggered, and the District Court, therefore, properly exercised "original" jurisdiction.

Moreover, the unconstitutional acts of Judge Dale, Referee Upton, and the GALs in the Youth Court Proceedings, when combined with the Court of Appeals' application of the Rooker-Feldman bar, has deprived Chrissy of her due process right to "adequate, effective, and meaningful" access to any forum in which to litigate her federal claims. See Bounds v. Smith, 430 U.S. 817, 822 (1977); see also Wood, 715 F.2d at 1547 (citing Testa v. Katt, 330 U.S. 386 (1947); General Oil Co. v. Crain, 209 U.S. 211 (1908)).

The Youth Court's adjudication of Chrissy's rights in the absence of, inter alia, meaningful representation deprived her of her right to raise her federal claims in the Youth Court, on appeal to the Mississippi Supreme Court, or on appeal, pursuant to 28 U.S.C. §1257, to the Court. The Court of Appeals' judgment, similarly, deprived Chrissy of her of right to have her federal claims heard, pursuant to 28 U.S.C. §1331, in a federal district court.

The application of the Rooker-Feldman doctrine here "is wholly contrary to one of the central concerns which motivated the enactment of §1983, namely, the 'grave congressional concern that the state courts had been deficient in protecting federal rights.'" Haring, 462 U.S. at 323 (quoting Allen, 449 U.S. at 98-99). Because Chrissy's access to state and federal court has been far from "adequate, effective, and meaningful," the Court should grant the Petition.

III. THE COURT OF APPEALS' DECISION WILL SEVERELY IMPAIR THE RIGHTS OF CHILDREN WHO MUST DEPEND UPON YOUTH COURTS TO PROTECT THEIR INTERESTS.

A. Summary Of Argument.

In this case, there was a lack of due process and meaningful representation in a state court abuse adjudication. Chrissy's court-appointed GALs failed to raise her federal claims at any stage of the state court proceedings. The Court of Appeals' judgment that Chrissy forfeited her federal rights under Rooker-Feldman effectively places the burden on the child to such proceedings to ascertain whether the state court is violating her constitutional rights, and whether her court-appointed GAL is providing meaningful representation. If violations occur and meaningful representation is lacking, and the child fails to raise her federal claims during the state court proceeding, she will--as the Court of Appeals has ruled in this case--forfeit her rights to due process. This application of Rooker-Feldman severely undermines a child's ability to ensure that proceedings in which her rights are adjudicated conform to the basic requirements of federal due process.

B. The Youth Courts' Obligation To Protect The Interests Of Alleged Victims Of Child Abuse.

Alleged victims of sexual abuse like Chrissy are vulnerable to constitutional deprivations in abuse adjudications. It is beyond dispute that young children are not capable of evaluating the constitutionality of Youth Courts' conduct of proceedings nor the adequacy of their representation by GALs. As a result, the Youth Court has an obligation to protect the interests of children over whom it exercises jurisdiction. See Miss.Code Ann. §§43-21-103, 43-21-127. Similarly, an appointed GAL must "protect the interest of [the] child for whom he has been appointed." Id. §43-21-121(2). At the trial of this matter, and on appeal, it was undisputed the Youth Court had a duty to protect Chrissy's interests.[17]

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[17]TT at 286, 539. The Court of Appeals assertion, in dicta, that "the district court erred in attributing to Upton and Dale, as judicial officers, the constitutional duty to protect Chrissy F.'s procedural rights beyond appointment of a [GAL]," therefore, is erroneous

The interests of alleged victims of sexual abuse oftentimes conflict with those who traditionally (i.e., parents, legal custodians) might be expected to protect the child's interests in an abuse adjudication.[18] Thus, the Youth Court Law requires that a GAL be appointed "if the interests of the child and the parent . . . appear to conflict" and in every case involving an abused or neglected child. Id. §43-21-121(1). Moreover, the general public is excluded from abuse adjudications (id. §43-21-203(6)), and notice and access to records of proceedings are controlled by the Youth Court (id. §§43-21-259, 43-21-261). Thus, children whose rights are being adjudicated in the Youth Court may be completely isolated from persons interested in the child's welfare.

In sum, the potential conflicts of interest in abuse adjudications and the confidential nature of those proceedings create a judicial environment in which the child and her constitutional rights are extremely vulnerable. Judge Dale and Referee Upton exploited these vulnerabilities here. As an alleged victim of sexual abuse by her father, Chrissy's interests were in conflict with those of her father and paternal relatives. Chrissy's mother had died and her maternal relatives were not given notice of the Youth Court Proceedings. Medley was given no notice. The proceedings were not held publicly. The Youth Court controlled who represented Chrissy. Like most abused children, Chrissy was wholly dependent upon the Youth Court to protect her interests; she received no such protection here.

The Youth Court adjudicated her rights despite an obvious lack of representation that was being afforded an otherwise unprotected child. Her GALs raised no due process claims or objections at any stage in the proceedings; they participated in the Youth Court's repeated violations of Chrissy's due process rights. The Youth Court made no effort to rectify the constitutional infirmities of its proceedings. The time period for filing of an appeal passed without any appeal being made to the Mississippi Supreme Court. See id. §43-21-651.

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as a matter of law and unsupported by this record. See duPont v. Southern Nat. Bank of Houston, Tex., 771 F.2d 874, 882 (5th Cir. 1985), cert. denied, 475 U.S. 1085 (1986).

[18]For example, Chrissy allegedly was sexually abused by her father.

C. A Federal Forum Must Remain Available To Ensure Federal Constitutional Protections Are Followed In State Court Abuse Adjudications.

The Court of Appeals' application of the Rooker-Feldman bar has far-reaching implications for all children who must rely upon a state youth court and their court-appointed representatives to protect their interests in sexual and physical abuse proceedings. A child cannot be expected to ascertain whether her GAL is adequately protecting her interests and rights; to recognize that her federal rights have been violated in an abuse adjudication; nor to raise those claims in the state appellate courts without assistance from the court and her representatives. Under the Court of Appeals' rule, however, Chrissy and other minors whose interests are not protected by the court or her representatives, must do so.

Moreover, as a practical matter, the Court of Appeals' ruling insulates judicial officers and their rulings from appellate or federal review in every situation where the court violates the child's due process rights and has appointed a GAL who fails to protect the child's interests by challenging those violations. Once the time for appeal to the state's Supreme Court passes, under the Court of Appeals' ruling, the child has forfeited her federal due process right to a meaningful, adequate and effective abuse adjudication. Indeed, the record here indicates that in the past six years, none of the approximately 500 cases that have come before the Youth Court have ever been appealed. See TT at 787-88.

Section 1983 litigants are entitled to hold judicial officers accountable for their constitutional deprivations of the rights of children, and to obtain injunctive relief when the state courts are deficient in protecting federal rights. See Haring, 462 U.S. at 323. The Court should grant the Petition to address this important issue.

IV. THE COURTS OF APPEAL ARE DIVIDED AS TO THE APPLICATION OF A PER SE RULE TO GALS ON THE ISSUE OF STATE ACTION.

A. Summary Of Argument.

This matter presents the important issue of whether court-appointed GALs act under color of state law. The Court has never

decided this issue, and the Courts of Appeal have applied conflicting tests in making that determination. The Fifth and Tenth Circuits have concluded that a court-appointed GAL can never act under color of state law for purposes of Section 1983. The Fourth and Ninth Circuits, however, apply a functional test to the determination of whether a court-appointed GAL has acted under color of state law. The Court should grant the Petition and resolve this conflict.

B. The Functional Test.

In general, "a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." West v. Atkins, 487 U.S. 42, 50 (1988). In Polk County v. Dodson, the Court carved out an exception to the foregoing when it held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U.S. 312, 325 (1981); see West, 487 U.S. at 50. The Court acknowledged that public defenders must "exercise independent judgment on behalf of the client" (Polk County, 454 U.S. at 321), and that "as counsel to a defendant in a criminal proceeding . . . a public defender is not acting on behalf of the State; he is the State's adversary" (id. at 322 n.13).

In West v. Atkins, the Court held that "a physician employed by [the state] to provide medical services to state prison inmates, acted under color of state law for purposes of §1983 when undertaking his duties in treating [inmates'] injur[ies]." 487 U.S. at 54. This ruling sharply limited the applicable scope of the Court's decision in Polk County. See id. at 50-52. The Court noted that

> "[t]o the extent this Court in Polk County relied on the fact that the public defender is a 'professional' in concluding that he was not engaged in state action, the case turned on the particular professional obligation of the criminal defense attorney to be an adversary of the State, not on the independence and integrity generally applicable to professionals as a class." (Id. at 51-52.)

Indeed, the Court expressly rejected "the proposition that no person acts under color of state law where he is exercising independent professional judgment." Id. at 52 n.10. The Court held that Polk County was

inapplicable as the physician's "ethical obligation to make independent medical judgments, did not set him in conflict with the State and other prison authorities." Id. at 51.

The appropriate test is not a per se rule regarding the exercise of "independent professional judgment," but an assessment of the GAL's "function within the state system." West, 487 U.S. at 55. "[T]he dispositive issue concerns the relationship among the State, the [GAL] and the [minor]." Id. at 56. "It is the [GAL's] function while working for the State . . . that determines whether he is acting under color of state law."[19]

C. The Courts Of Appeal Are Divided.

In determining whether a GAL acts under color of state law for purposes of Section 1983, the Fifth Circuit and the Tenth Circuit have established the per se rule that GALs do not act "under color of state law."[20] In holding that Cooper and Broadhead did not act under color of state law, the District Court reasoned that

> "[b]ecause a [GAL] owes a duty to the minor to promote and protect the minor's best interests and must exercise independent professional judgment in carrying out that duty, a [GAL] does not function as a representative of the state while acting on behalf of his client." (780 F.Supp. at 1116.)

Thus, the District Court--as affirmed by the Court of Appeals--erroneously applied a per se rule to the GALs based upon the purported

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[19]Id.; footnote omitted; see also Edmonson v. Leesville Concrete Co., Inc., ___ U.S. ___, 111 S.Ct. 2077, 2085-87 (1991); Lugar v. Edmonson Oil Co., 457 U.S. 922, 931-32 (1982); Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).

[20]See Chrissy, 780 F.Supp. at 1116, aff'd, Chrissy III, 995 F.2d at 600; Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986); see also Doe v. Bobbit, 665 F.Supp. 691, 695 (N.D.Ill. 1987), rev'd on other grounds, 881 F.2d 510 (7th Cir. 1989) ("Because a [GAL] owes his undivided loyalty to the minor whose interests her represents, . . . [GALs], like public defenders, do not act under color of state law in fulfilling their official duties."); Clay v. Friedman, 541 F.Supp. 500, 503 (N.D.Ill. 1982).

"independent professional judgment" they are required to exercise on Chrissy's behalf. The District Court relied upon the Tenth Circuit decision, Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986). The Tenth Circuit in Meeker, like the Fifth Circuit here, "misread Polk County as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities." West, 487 U.S. at 51.

In contrast, the Fourth Circuit in Thomas S. v. Morrow found a GAL's reliance on Polk County "misplaced." 781 F.2d 367, 377 (4th Cir.), cert. denied, 479 U.S. 869 (1986). The Fourth Circuit, relying upon Lugar v. Edmonson Oil, held that a GAL who performs a custodial function and who acts together with the state officials in the placement of a ward of the state whom he had been appointed to represent, acted under color of state law. Thomas S., 781 F.2d at 377-78. The Ninth Circuit, similarly, has applied a functional test to the determination of whether a GAL has acted "under color of state law."[21]

In sum, the Fourth and Ninth Circuits, like the Court in West, examine the relationship between the state, the GAL and the minor or ward, while the Fifth and Tenth Circuits apply a per se rule. The Court should grant the Petition and resolve this conflict.

V. THE COURT OF APPEALS' RULING THAT CHRISSY'S GALS DID NOT ACT UNDER COLOR OF STATE LAW CONFLICTS WITH THE COURT'S DECISIONS.

The District Court ruled that Chrissy's GALs did not act under color of state law, and the Court of Appeals affirmed without discussion. The District Court reasoned that because GALs "must exercise independent professional judgment" in protecting minors' interests, they do not act under color of state law. As discussed above, however, the District Court's reasoning was expressly rejected in West, 487 U.S. at 50-51. The Court of Appeals' affirmance, therefore, conflicts with the

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[21]See Taylor v. First Wyoming Bank, N.A., 707 F.2d 388, 390 (9th Cir. 1983); see also Kohl, 767 F.Supp. at 899-900 (N.D.Ill. 1991) ("Unlike the public defender, . . . the function of the GAL is not necessarily adverse to the state. Therefore, it is not appropriate to extend the per se rule which [Polk County] established for public defenders, to GALs").

"functional" test articulated in West and in other decisions of the Court. Because the Court of Appeals' affirmance conflicts with West, the Petition should be granted.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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November 8, 1993

NO. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHRISSY F., By Her Next Friend And
Guardian Ad Litem, DONNA MEDLEY,

Petitioner,

VS.

SEBE DALE, JR., Individually and as Chancellor for the Tenth Chancery Court District of Mississippi, GARLAND UPTON, Individually and as Referee of the Marion County Youth Court, PHILLIP BROADHEAD and FRED COOPER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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CHRISSY F., By Her Next Friend and Guardian Ad Litem Donna Medley, Plaintiff-Appellee Cross-Appellant,

v.

MS DEPT. OF PUBLIC WELFARE, et al., Defendants,

MS Dept. Of Public Welfare, Thomas H. Brittain, Jr., Individually and as Commissioner of the MS Dept. of Public Welfare, Marion County Welfare Department, Hancock County Welfare Department, Sharon Whitt, Individually and as Supervisor of Marion County Welfare Department, Angela Lacy, Individually as Caseworker for Marion County Welfare Department, Phillip Broadhead and Fred Cooper, Defendants-Cross-Appellees,

Sebe Dale, Jr., Individually and as Chancellor for the Tenth Chancery Court District of MS and Garland Upton, Individually and in his capacity as Referee of the Marion County Youth Court, Defendants-Appellants Cross-Appellees.

No. 92-7002.

United States Court Of Appeals
Fifth Circuit.

July 7, 1993.

James F. Steel, Robert G. Jenkins, Sp. Asst. Attys. Gen., Mike Moore, Atty. Gen., Jackson, MS, for defendants.

Sheila Brogna, Children's Law Offices, Daniel S. Mason, Furth, Fahrner, Mason, San Francisco, CA , for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before DAVIS and JONES, Circuit Judges, and PARKER.[1]

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[1]Chief Judge, Eastern District of Texas, sitting by designation.

EDITH H. JONES, Circuit Judge:

This case comes to us on appeal for the third time. It involves allegations that defendants violated a minor's constitutional rights in Youth Court and Chancery Court proceedings in Mississippi. After trial, the district court refused to grant relief on claims made against all but two of the defendants. These two defendants, a Mississippi chancery court judge and a youth court referee, were found to have violated the minor's constitutional right of access to the courts. The district court also found that the referee had violated the minor's procedural due process rights. Both defendants appeal the decision of the district court. The guardian ad litem cross-appeals, seeking to resurrect her claims against all of the other defendants. We hold that the district court did not have jurisdiction to grant injunctive relief against the judge and referee. In all other respects, we affirm.

I

For the sake of brevity we refer the reader to the carefully detailed statement of facts in the district court's memorandum opinion and order. *Chrissy F. By Medley v. Mississippi Department of Public Welfare, et al.*, 780 F. Supp. 1104 (S.D.Miss. 1991). What follows is a brief summary of the most recent or relevant events in the long and tortured history of this case.

On July 8, 1988, Donna Medley, a California resident, filed a complaint in the United States District Court for the Southern District of Mississippi on behalf of Chrissy F., a Mississippi minor then six years old, alleging various violations of a vast array of constitutional and statutory rights and privileges. The complaint requested that declaratory judgment be granted against defendants Mississippi Department of Public Welfare (MDPW); Thomas H. Brittain, Commissioner of MDPW; Mississippi Attorney General Mike Moore; Sebe Dale, Jr., Chancellor of the Tenth Chancery Court District of Mississippi; Richard Douglas, District Attorney for the Fifteenth Circuit Court District; Sharon Whitt, Supervisor of the Marion County Welfare Department; Jeanette Werbley, Supervisor of the Hancock County Welfare Department; Angela Lacy, a caseworker with the Marion County Welfare Department (state defendants); Dr. Franklin D. Jones; Dr. S. Kimball Love; Timothy Charles Foxworth, father of Chrissy F.; and Does 1-25; alleging that these defendants had violated the minor's right not to be

deprived of state and federally created benefits of life, liberty, and the pursuit of happiness, rights to freedom from harm and violation of the Fourteenth Amendment, 42 U.S.C. § 5103, *et. seq.*, and an order issued by the Juvenile Court of the San Francisco Superior Court of California.

The complaint initially sought to have the United States District Court set aside the custody rulings of Chancellor Dale, a Mississippi Chancery Court judge, and award custody of Chrissy F. to the San Francisco Department of Social Services or to place her in an alleged neutral and stable setting, not with any maternal or paternal relatives, in cooperation with the National Children's Advocacy Center in Huntsville, Alabama. Additionally, the complaint sought an order requiring all defendants to pay for a comprehensive physical, psychological, and psychiatric evaluation of Chrissy F., and to force them to file a petition in the Youth Court of Hancock County, Mississippi, on behalf of the minor, to immediately investigate and pursue reports of sexual and psychological abuse.

Additionally, the complaint sought compensatory and punitive damages against all of the defendants except Youth Court Referee Upton and Chancellor Dale. The defendants moved to dismiss the complaints pursuant to Fed.R.Civ.Proc. § 12(b)(1), or in the alternative, moved to dismiss pursuant to Fed.R.Civ.Proc. § 12(b)(6). On August 26, 1988, the district court granted the § 12(b)(1) motion, finding that the complaint was "inextricably intertwined" with the state court judgment.

We reversed and remanded the case to the district court, *Chrissy F. v. Mississippi Department of Public Welfare*, 883 F.2d 25 (5th Cir. 1989) (*Chrissy I*), directing the district court to hold a hearing to determine if Donna Medley should be appointed as guardian ad litem for Chrissy F. in these proceedings. In that opinion, we did not address any of the jurisdictional issues raised in the appeal such as the collateral attack on state court orders, domestic relations exception, or immunity questions before the court.

On remand, the district court appointed Donna Medley as guardian ad litem for Chrissy F. The court subsequently dismissed as defendants, by agreement with the plaintiff, Dr. Franklin Jones, Dr. Kimball Love, and Attorney General Mike Moore. The remaining parties conducted discovery and depositions. The defendants filed motions to dismiss or for summary judgment on March 30, 1990, on the

grounds of Eleventh Amendment immunity, qualified immunity, absolute judicial immunity, and absolute prosecutorial immunity.

The district court denied the motions to dismiss except as to the Eleventh Amendment immunity from damages of the state defendants in their official capacities and as to absolute immunity and damages of the guardians ad litem, Broadhead and Cooper. The state defendants and District Attorney Douglas immediately appealed the denial of their immunity claims to this court. We affirmed the district court's opinion in *Chrissy F. v. Mississippi Department of Public Welfare, et al.*, 925 F.2d 844 (5th Cir. 1991) (*Chrissy II*). Our holding was, however, strictly limited to issues of absolute and qualified immunity from personal judgments for money damages, over which this court has interlocutory appellate jurisdiction. The immunity questions were decided only as to those defendants against whom Chrissy sought monetary damages--District Attorney Douglass, and Mississippi social workers Brittain, Whitt, Lacy and Werbley. *Chrissy II* did not consider the general defense of failure to state a claim or the availability of declaratory and injunctive relief. 925 F.2d at 849, 851.

The district court held a nonjury trial on the merits in June, 1991. Later, the court issued a lengthy memorandum opinion and order, dismissing all remaining claims against the defendants except Chancellor Dale and Youth Court Referee Upton. The district court found that Dale and Upton had violated Chrissy's right of access to courts. The district court also found that Upton had violated Chrissy's procedural due process rights. The district court enjoined Upton, in his capacity as Youth Court Referee of Marion County, Mississippi, to conduct a new youth court hearing to reexamine the allegation of Chrissy's sexual abuse. This appeal followed.

II

Appellants Dale and Upton argue that the district court had no subject matter jurisdiction to review collateral attacks on state court judgments. They contend that the relief sought by Chrissy F. in federal district court was essentially a reversal of the Chancery Court custody ruling. They also argue that the district court's order enjoining Upton to conduct a new hearing actually does reverse the final and definitive orders of the Chancery Court and Youth Court. They argue that

Chrissy's only recourse was to seek review in the Mississippi state court system and then ultimately in the United States Supreme Court.

Chrissy F. defends the district court's ruling by pointing to the Fifth Circuit's previous reversal of the district court's dismissal for lack of subject matter jurisdiction. The appellees argue that the Fifth Circuit *implicitly* found subject matter jurisdiction by remanding to the district court for the appointment of a guardian ad litem. The appellees further assert that Chrissy F. did not seek and has not obtained a reversal of the state court custody decree in federal court. Rather, they argue that the district court's order enjoining Upton to hold another abuse adjudication is designed to insure that the proceeding conforms to her statutory and constitutional rights. Finally, they contend that Chrissy F. was not a party in the Chancery Court proceeding before Judge Dale, which originated as a divorce action between her parents, and therefore could not seek review in the state appellate courts.

The Supreme Court has stated that a "United States district court has no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Indeed, the Supreme Court has stated that "a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims." *Feldman*, 460 U.S. at 482 n.16, 103 S.Ct. at 1316 n.16. Such failure may lead the party to "forfeit his right to obtain review of the state court decision in any federal court." *Id.* This is not a case in which a party had sued in federal court to "mount a general challenge to the constitutionality" of a statute or rule. *Id.* at 483, 103 S.Ct. at 1316. Medley does not explain how the relief she sought and obtained in federal court against Dale and Upton differs from that available if direct appeal had been taken in state court. She argues that the slapdash state process itself, which violated state law in several respects, also amounted to a deprivation of Chrissy F.'s right of access to courts and procedural due process rights guaranteed under the United States Constitution. The Mississippi courts are well equipped, however, to review violations of federal constitutional law, as Medley's counsel conceded at oral argument. Chrissy's guardians ad litem were present at the Chancery Court hearing on December 31, 1987, which led to Chancellor Dale's modified affirmance of his order awarding custody of Chrissy to her father, yet Medley offers no reason why neither she nor the guardians ad litem were unable

to appeal the Chancery Court or December, 1987 Youth Court orders in the state appellate courts.[2]

The record in this case reveals that the plaintiff's suit is "patently an attempt to collaterally attack the validity of [the state court judgment]." *Almon v. Sandlin*, 603 F.2d 503, 506 (5th Cir. 1979). As the district court originally believed, this suit, insofar as it seeks a new adjudication of Chrissy's alleged abuse and custody, is "inextricably intertwined" with the state court's rulings against the appellants. *Feldman*, 460 U.S. at 483 n.16.

Our decision in this case is guided by *Reed v. Terrell*, 759 F.2d 472 (5th Cir. 1985). In *Reed*, the plaintiffs filed suit under various statutory provisions, including 42 U.S.C. §§ 1983, 1985, and 1986. They asserted that their constitutional rights of due process and equal protection were violated by an award of attorney's fees to the defendants. In addition to two attorneys, the plaintiffs named as defendants a judge, a district clerk, and the State Bar of Texas. As here, they sought declaratory relief, injunctive relief, and damages. This court remarked that "the 'essential relief' sought by the plaintiffs is reversal of the state court award of attorneys fees against them." *Id.* at 473. Citing *Feldman*, *Reed* concluded that the suit was "inextricably intertwined" with the state court's award against the plaintiffs, and it affirmed the district court's dismissal of the suit for want of jurisdiction.

The appellees attempt to distinguish *Reed* by noting that the parties to the state suit in that case were also the parties to the federal suit, and thus, they would have been able to seek review in state court. However, as we have noted, Medley has not indicated why she or any other interested persons could not pursue an appeal in state courts. The guardians ad litem, for instance, had a duty to act in Chrissy F.'s best interest. Medley challenges their effectiveness and judgment, but they were knowledgeable attorneys, and it is on their shoulders that the duty to object to the informality of the Youth Court hearing rested. The

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[2]Chrissy F.'s maternal grandmother did attempt to continue the appeal of the August, 1987 Chancery Court custody order following the death of Chrissy's mother, but her attempt was denied. The Chancery Court "held in abeyance" its final custody order, however, after Chrissy F. was brought back from San Francisco, and it modified that order on December 31 to grant day-to-day responsibility for Chrissy F. to her paternal grandmother while her father worked weeklong shifts in the offshore oil industry.

district court erred in attributing to Upton and Dale, as judicial officers, the constitutional duty to protect Chrissy F.'s procedural rights beyond appointment of a guardian ad litem.[3] To impose such a duty on a judicial officer in the performance of judicial duties is to circumvent the state court appellate procedures and potentially to cast the judge in a role uncomfortably close to that of advocate. It is enough that appellate procedures exist and that a remedy may be had against the guardians *ad litem*.

Finally, the appellees' assertion that we decided in favor of jurisdiction to award this injunctive relief in *Chrissy I* is unavailing. The court did not address any jurisdictional issues in that opinion. Instead, we remanded to the district court for a determination of whether Medley was the appropriate person to represent Chrissy under Mississippi law in accordance with Fed.R.Civ.Proc. § 17(b). Resolution of guardian ad litem status was regarded as a predicate to any further consideration of the case, including jurisdictional questions. Thus, the court did not decide jurisdiction either explicitly or by necessary implication.[4] We have done so today.

III.

On cross-appeal, Medley challenges the district court's failure to award relief under § 1983 for constitutional claims and the alleged violation of the federal Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq*. The targets of these claims are welfare department officials Brittain, Whitt and Lacy and the guardians ad litem Broadhead and Cooper. We agree with and adopt the district court's analysis of these claims. Its factual findings were not clearly erroneous, and its legal analysis was correct and appropriate.

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[3]Specifically, the district court held that Dale violated Chrissy's right of access to the courts by conducting a "hearing" on December 18, 1987, over which he "lacked jurisdiction", by not having the hearing transcribed, and by not securing attendance of the guardians ad litem at the hearing. The district court held that Upton violated Chrissy's right of access to Youth Court and her procedural due process rights by the informality of his December 30, 1987 proceeding and by failing to insure proper representation of Chrissy F. by the guardians ad litem. All of these deficiencies raised issues that were potentially correctable within the Mississippi judicial system.

[4]Similarly, as above noted, we did not decide jurisdiction in *Chrissy II*.

Accordingly, the district court erred in exercising jurisdiction to grant injunctive relief against Upton and Dale in this case. Its decision in this respect is REVERSED and RENDERED in their favor. In all other respects, the decision of the district court is AFFIRMED.

REVERSED and RENDERED in Part, AFFIRMED in Part.

CHRISSY F., By Her Next Friend and Guardian Ad Litem Donna MEDLEY, Plaintiff-Appellant,

v.

MISSISSIPPI DEPARTMENT OF PUBLIC WELFARE, et al., Defendants-Appellees.

No. 88-4716.

United States Court Of Appeals,
Fifth Circuit.

September 11, 1989.

Sheila Brogna, Legal Services For Children, Inc., Daniel S. Mason, Ronald Elsberry, San Francisco, Cal., for plaintiff-appellant.

Charles Bearman, Leslie Scott, Mike Moore, Atty. Gen., John T. Kitchens, Robert G. Jenkins, Asst. Attys. Gen., Jackson, Miss., for state defendants.

Thomas, McNeese, Aultman. Tyner, McNeese, Ruggin, Ltd., Columbia, Miss., for R. Douglass.

Larry O. Norris, Hattiesburg, Miss., for Timothy C. Foxworth.
Appeal from the United States District Court For the Southern District of Mississippi.

Before GOLDBERG, JOHNSON, and DUHE, Circuit Judges.

DUHE, Circuit Judge:

Donna Medley appeals the district court's dismissal of a complaint alleging civil rights violations and pendent state claims which she filed on behalf of an infant, Chrissy F. We reverse and remand.

Medley's complaint alleges the following facts which, for present purposes, we assume to be true: Chrissy's father, Timothy Foxworth, sexually abused her. Her mother, Dorrie Singley, divorced

Foxworth because of this behavior. A Mississippi state court awarded custody of Chrissy to Singley but later awarded custody to Foxworth. Singley presented medical evidence of Chrissy's sexual abuse to the county welfare department, the county district attorney, and the judge handling the custody case. These officials did not adequately investigate the case or take any action to protect Chrissy. Subsequently Singley covertly placed Chrissy with another family in order to protect her from Foxworth. Shortly thereafter Singley died. Chrissy resurfaced in San Francisco, California where, through the efforts of an attorney from Legal Services for Children, Inc., a California state court placed Chrissy in the temporary custody of the San Francisco Department of Social Services (DSS). Medley provided a foster home for Chrissy while she was in the temporary custody of DSS. Based on assurances made by Mississippi officials at a detention hearing, the California court order Chrissy returned to Mississippi. After Chrissy's return to Mississippi, the California court later determined that Mississippi officials had not met the conditions set for Chrissy's return and appointed Medley guardian *ad litem* for Chrissy.

Medley filed suit in federal district court in Mississippi as "next friend" and guardian *ad litem* of Chrissy alleging that various Mississippi officials and agencies had violated Chrissy's civil rights. She also alleged pendent state law theories against Foxworth. Finding Medley's action inextricably intertwined with the Mississippi state court's judgment awarding custody of Chrissy to Foxworth, the district court dismissed it for lack of subject matter jurisdiction.

Medley appeals contending that the complaint does not seek review of the custody decree but rather alleges that lack of an adequate investigation of Chrissy's case by Mississippi officials violated Chrissy's federal constitutional and statutory rights. Appellees challenge, *inter alia*, Medley's capacity to sue on Chrissy's behalf arguing that the California court did not have jurisdiction of the case therefore Medley's appointment as guardian *ad litem* was void *ab initio*. They further argue that even if it was valid, it would not give Medley capacity to sue on behalf of Chrissy in this action because under Fed.R.Civ.P. 17(b), Medley must comply with Mississippi law to validly represent Chrissy in federal district court in Mississippi. Medley has not complied with Mississippi law. In her appellate brief, Medley abandons the contention that she is suing as Chrissy's guardian *ad litem* (an apparent acknowledgment of the correctness of defendant's argument that the

California court lacked jurisdiction) and states that she is suing as Chrissy's "next friend". Appellees respond that Medley is not a "proper" next friend. They note that Medley only knew Chrissy briefly and that this contact resulted from a parental kidnapping.

The issue of capacity to sue on behalf of an infant is governed by Fed.R.Civ.P. 17(b) and (c). Rule 17(b) provides that when an individual is acting in a representative capacity, their capacity to sue shall be determined by the law of the state in which the district court is held. Rule 17(c) provides:

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

The courts have extended the authority to appoint a guardian *ad litem* to the situation where the general representative's interests conflict with those of the person she is supposed to represent. *Adelman on Behalf of Adelman v. Graves*, 747 F.2d 986 (5th Cir.1984); *Hoffert v. General Motors Corp.*, 656 F.2d 161, 164 (5th Cir.1981) *cert. denied*, 456 U.S. 961, 102 S.Ct. 2037, 72 L.Ed.2d 485 (1982); Wright and Miller, *Federal Practice and Procedure*: Civil § 1570. Furthermore, when the complaint shows a conflict of interest between a general guardian and an infant, the court should, *on its own motion*, determine whether the infant's interests are adequately protected by the general guardian's representation. *Adelman*, 747 F.2d at 988. In making this determination the district court should consider that access to the courts by aggrieved persons should not be unduly limited, particularly where the complaint alleges a custodian has violated an infant's rights. *Adelman*, 747 F.2d at 989.

Medley's complaint on behalf of Chrissy shows a conflict of interest between Chrissy and her father, the person who would be expected to assert Chrissy's legal rights. Furthermore, Medley's interests

and Chrissy's are not necessarily the same. We note that "however worthy and highminded the motives of 'next friends' may be, they inevitably run the risk of making the actual [party] a pawn to be manipulated on a chess board larger than his own case." *Lenhard v. Wolff*, 443 U.S. 1306, 1312, 100 S.Ct. 3, 61 L.Ed.2d 885, 890 (1979). Medley is a resident of California, she is not related to Chrissy, and she only provided foster care for her for about two weeks. Under these circumstances, we can only speculate as to Medley's motive for pursuing this action in federal district court in Mississippi and, absent contradictory factual findings, we cannot safely assume that Medley would necessarily protect only Chrissy's interests.

We do not hold that Medley should or should not be appointed Chrissy's representative in this litigation. It is within the district court's discretion to determine Chrissy's need for representation and who may best fill that need. We merely hold that the district court must either appoint a guardian *ad litem* or next friend who qualifies under Mississippi law or enter a finding that Chrissy's interests are adequately protected without such an appointment.

We note that if the district court determines Medley is the appropriate person to represent Chrissy, it has the discretion to see if Medley is able to qualify as Chrissy's representative under Mississippi law in accordance with Fed.R.Civ.P. 17(b) so that the action may be continued without prejudice to the parties. Wright and Miller, *Federal Practice and Procedure*, Civil § 1571.

The district court's primary concern on remand should be to assure that Chrissy's interests in vindicating her statutory and constitutional rights are properly protected. The order of dismissal is reversed, and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CHRISSY F., By her next friend and Guardian ad litem Donna MEDLEY, Plaintiff-Appellee,

v.

MISSISSIPPI DEPARTMENT OF PUBLIC WELFARE, et al., Defendants-Appellants.

No. 90-1332.

United States Court of Appeals,
Fifth Circuit.

March 8, 1991.

James F. Steel, Asst. Atty. Gen., Mike Moore, Atty. Gen., Jackson, Miss., for all defendants-appellants except Douglass.

Thomas D. McNeese, Aultman, Tyner, McNeese & Ruffin, Ltd., Columbia, Miss., for Richard L. Douglass.

Daniel S. Mason, Furth, Fahrner & Mason, Sheila Brogna, Children's Law Offices, San Francisco, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before RUBIN, JOHNSON, and BARKSDALE, Circuit Judges:

ALVIN B. RUBIN, Circuit Judge:

An eight-year-old child seeks injunctive and declaratory relief against two judges, a state district attorney, and various state and county welfare departments and their employees, as well as damages from the district attorney and the welfare department employees, alleging that each of them in various ways failed to report, investigate, or take any action in response to repeated reports that she had been sexually abused by her father. All of the defendants appeal the district court's denial of their motions to dismiss, and the district attorney also appeals denial of his motion for summary judgment, on the grounds of Eleventh

Amendment immunity and absolute and qualified personal immunities. If the allegations of the complaint are proved, the state-official defendants violated at least some of Chrissy's clearly established constitutional rights, and we therefore affirm the denial of the motion to dismiss insofar as it seeks damages from those officials. We affirm the denial of the district attorney's motion for summary judgment because the district court correctly held that there are genuine disputes of material fact and that, if Chrissy's allegations are proved, the district attorney would be liable for some of his actions in his individual capacity. Lacking jurisdiction, we refuse to consider the arguments: (1) that the complaint fails to state a claim for which relief could be granted because the district court's denial of the motion to dismiss on that ground is interlocutory and not appealable; and (2) that the district court should have granted the defendants immunity from declaratory and injunctive relief.

I.

These are but a few of the facts well pleaded in the 81-page complaint. On review of a district court's denial of dismissal for failure to state a claim for which relief can be granted, we must accept as true all well-pleaded facts. The complaint is not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[1] The same rule applies when immunity is urged as a defense by a motion to dismiss.[2]

In August 1984, Dorrie Singley, the mother of Chrissy F., who was then two years old, initiated divorce proceedings in the Chancery Court of Marion County against her husband, Chrissy's father, Timothy Foxworth, because she had allegedly seen Foxworth sexually molesting their daughter. Chancellor Sebe Dale awarded custody of Chrissy to her mother and gave Foxworth visitation rights. Shortly thereafter, Chrissy resisted visits with Foxworth and began complaining of genital pain. Singley took her to a hospital emergency room, where Dr. William Bradford found symptoms consistent with sexual molestation and filed a

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[1]*Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

[2]*Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir.), *cert. denied* 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985).

Report of Suspected Battered Child (DPW-440) with the Hancock County Welfare Department (HCWD). Bridget Logan, a social worker at HCWD, referred Chrissy to Dr. R. Bryant McCrary, who after examining her filed a DPW-440 with the Mississippi Department of Public Welfare (MDPW), stating that Chrissy's symptoms were "very suspicious of child abuse." Social Worker Logan telephoned Chancellor Dale and informed him of Dr. McCrary's report and recommendations. Chancellor Dale, however, refused to take any action or to dismiss the Chancery Court proceedings and forward all relevant documents to the Youth Court as required by the Mississippi Youth Court Law whenever an abused child is involved.[3] Neither HCWD nor MDPW further investigated the medical reports or referred the matter to the Hancock County Youth Court, the Youth Court Prosecutor, or the District Attorney.

A Hancock County Assistant District Attorney interviewed Chrissy in November 1986, and wrote to the District Attorney of Marion County Richard Douglass, urging him to prosecute Foxworth for abusing Chrissy. Singley had twice previously sought assistance from D.A. Douglass, but he had neither reported the matter to MDPW nor conducted any further investigation into the allegations of abuse. Although he received copies of the doctors' reports in November 1986, D.A. Douglass again failed to report or investigate the matter.

In December 1986, Foxworth filed a petition for modification of custody; Singley brought countercharges of abuse. In August 1987, Chancellor Dale awarded Foxworth paramount custody of Chrissy, finding that Singley's lifestyle subjected Chrissy to detrimental influences and that there was "no credible evidence that Chrissy [had] been sexually abused." Shortly thereafter, Dr. Rebecca Russell at Children's Hospital in New Orleans performed a colposcopic examination on Chrissy, which yielded conclusive evidence of sexual molestation. Dr. Sylvia Strickland, a leading expert in the field, later reviewed the films taken of Chrissy and confirmed Dr. Russell's findings. Chancellor Dale, however, denied a motion for a new trial based on these findings. Singley met with D.A. Douglass once again and sent him Dr. Russell's report, but he neither investigated the matter nor

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[3]Miss.Code Ann. § 43-21-159 (1972 & Supp. 1990).

reported it to MDPW or the Youth Court, as required by the Mississippi Youth Court Law.[4]

On August 27, Singley filed a motion to reopen the custody hearing in Chancery Court, a second motion seeking appointment of a guardian *ad litem* for Chrissy, and a motion to recuse Chancellor Dale. None of these motions was acted upon. Instead, Chancellor Dale found Singley in contempt of court for failing to return Chrissy to her father's custody. Singley thereupon placed Chrissy in the care of friends and went into hiding.

Singley's attorney filed a Certificate of Appeal from the child-custody ruling in the Mississippi Supreme Court. She also wrote to Chancellor Dale, requesting that, to perfect the appeal, he sign an order ruling on the August 27 motions, but Dale never did so.

Two months later Singley died of a brain aneurysm. In November, Chancellor Dale denied Singley's lawyer's motion to substitute Singley's grandmother as her representative in her appeal and the appeal was dismissed.

In December, the family who had been taking care of Chrissy took her to California where they presented evidence of molestation to the San Francisco Department of Social Services (DSS) and the California Court for the County of San Francisco. A court-appointed psychiatrist reported that Chrissy had recounted incidents of sexual molestation by her father. The California Court issued a detention order and placed Chrissy in the temporary custody of DSS in the home of Donna Medley. Subsequently, the California Court decided to permit Chrissy's return to Mississippi with the following conditions: 1) she be placed in a neutral and stable setting, not with any maternal or paternal relatives; 2) she be physically and psychologically evaluated and all treatment recommendations be followed; 3) a qualified attorney be appointed her guardian *ad litem*; 4) a petition for proceeding in the Mississippi Youth Court be filed by MDPW before Chrissy's return to Mississippi; and 5) Chrissy have no contact with her father until so ordered by the Mississippi Court. Both Chancellor Dale and Thomas H. Brittain, the MDPW Commissioner, agreed to these conditions.

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[4] *Id.* at § 43-21-353.

Chancellor Dale entered an order which held the earlier Chancery Court award of custody to Foxworth "in abeyance" until the Mississippi Youth Court concluded its proceedings.

In accordance with what he contends was an order of Chancellor Dale, D.A. Douglass appeared at the California Court hearing, assured the Court that he would comply with its conditions, assumed temporary custody of Chrissy, and brought her back to Mississippi where she spent the night at Douglass's home. She was visited there by her paternal grandmother and aunt and her father, all with Douglass's approval, despite the express condition of the California court order, agreed to by Chancellor Dale, that she have no contact with her father until a court order permitted it.

The following day, Chancellor Dale ordered evaluations of Chrissy by a doctor and psychiatrist, both of whom had previously examined her and decided that she had not been abused. Chancellor Dale also ordered that Chrissy be placed in the home of her paternal grandmother, to which her father had unlimited access. Neither the Youth Court, any guardian *ad litem*, nor the California court was notified, nor were these orders made in the course of a judicial proceeding.

Meanwhile, the County Attorney and Youth Court Prosecutor had filed a petition in the Youth Court for temporary custody of Chrissy. Youth Court Referee Garland Upton thereupon appointed two guardians *ad litem* and ordered that MDPW assume temporary custody of Chrissy. On December 30, Upton presided over a hearing regarding Chrissy. Neither Chrissy's guardians *ad litem*, D. A. Douglass, MDPW, nor Chancellor Dale introduced into evidence any of the medical reports substantiating the charges that Chrissy had been abused. Based on evidence presented by the County Attorney, who is charged with prosecuting Youth Court proceedings,[5] the Youth Court recommended that Chrissy remain in the legal custody of her father, but cared for on a daily basis by her paternal grandmother. The next day Chancellor Dale reaffirmed his prior order awarding custody to Foxworth.

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[5]Miss.Code Ann. § 43-21-117 (1972).

Donna Medley, as Chrissy's guardian *ad litem*, sued D.A. Douglass, Chancellor Dale, Referee Upton, the guardians *ad litem* appointed by Referee Upton, MDPW and Commissioner Brittain, the Marion and Hancock County Welfare Departments, and several social workers and supervisors employed by those departments, seeking damages from some of the defendants and injunctive relief for violation of Chrissy's rights: to meaningful access to the courts; to freedom from denial of her liberty in violation of the Fourteenth Amendment; to the procedural due process of law guaranteed by the Fourteenth Amendment prior to deprivation of entitlements guaranteed by the Mississippi Youth Court Law;[6] and to statutory protections under Titles IV and XX of the Social Security Act[7] and the Child Abuse Prevention and Treatment Act of 1974.[8] Chrissy included in her complaint a prayer for declaratory relief and asserted pendent state-law claims for negligence and violation of state statutes. The district court dismissed the suit under F.R.C.P. 12(b)(1), finding that the complaint was "inextricably intertwined" with the state court judgment. We reversed and remanded, directing the district court to conduct a hearing for the purpose of appointing a guardian *ad litem* for Chrissy.[9] The district court thereupon appointed Medley as Chrissy's next friend.

After discovery, all of the defendants filed motions to dismiss on various grounds, including sovereign immunity and absolute and qualified immunity, and D.A. Douglass also filed a motion for summary judgment. The district court held that the Eleventh Amendment rendered the state and all of the individual defendants immune to damages in their official capacities and the guardians *ad litem* entitled to absolute immunity, but rejected the claims of D.A. Douglass for absolute immunity and the other state defendants for qualified immunity from damages. The defendants appeal the district court's denial of their motion to dismiss the complaint for failure to state a claim for which

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[6]Miss.Code Ann. §§ 43-21-101 *et seq.* (1972 & Supp. 1990).

[7]42 U.S.C. §§ 620 *et seq.* (1988).

[8]42 U.S.C. §§ 5101 *et seq.* (1988).

[9]*Chrissy F. By Medley v. Mississippi Dept. of Public Welfare*, 883 F.2d 25 (5th Cir. 1989).

relief can be granted and the denial of those immunity claims rejected by the district court.

II.

Ordinarily, only final judgments and a few specific interlocutory rulings are appealable. The court of appeals therefore lacks jurisdiction of an appeal from an interlocutory order such as one rejecting an asserted defense. In *Mitchell v. Forsyth*[10] and *Nixon v. Fitzgerald*,[11] the Supreme Court held, however, that an appellate court may review immediately the denial of a claim of either qualified or absolute immunity from damages as a final order under 28 U.S.C. § 1291.[12] "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."[13] The Court stressed that a claim of immunity from damages "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. An appellate court reviewing the denial of the defendant's claim of immunity need not . . . determine whether the plaintiff's allegations actually state a claim,"[14] but only whether the acts allegedly performed by the defendant violated clearly established law. This court therefore has jurisdiction to review the denial of the defendants' claims of personal immunity from damages, but lacks jurisdiction to review the district court's denial of defendants' motion to dismiss for failure to state a claim.

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[10]472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

[11]457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

[12]*Id.* at 742-43, 102 S.Ct. at 2697; *Mitchell*, 472 U.S. at 525-27; 105 S.Ct. at 2815-16.

[13]*Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815, citing *Harlow v. Fitzgerald*, 457 U.S. 800 at 818, 102 S.Ct. 2727 at 2738, 73 L.Ed.2d 396.

[14]*Mitchell*, 472 U.S. at 527-28, 105 S.Ct. at 2816.

The denial of Eleventh Amendment immunity to damage claims is immediately appealable for the same reasons justifying review of the denial of personal immunity.[15]

Chrissy also seeks declaratory and injunctive relief. Neither absolute nor qualified personal immunity extends to suits for injunctive or declaratory relief under § 1983.[16] We review therefore only the denial of various claims of immunity from damages.

Whether the Child Abuse Prevention and Treatment Act[17] or Titles IV and XX of the Social Security Act[18] authorize a private cause of action for the failure of a state official to report known or suspected instances of child abuse and neglect[19] and whether the complaint states a claim under 42 U.S.C. § 1982 or § 1985(3) are not issues in this appeal. We express no opinion concerning those questions.

III.

The Eleventh Amendment bars claims for damages not only when the claim is directed against the state but also when the claimant seeks damages from the State's officers in their official capacities and the damages would be paid out of the state treasury. In her brief on appeal, Chrissy asserts that the only defendant she is suing in his official capacity for damages is D.A. Douglass. Chrissy concedes, however, that if the District Attorney in Mississippi is a state, rather than local, official, he is entitled to Eleventh Amendment immunity in his official capacity. In Mississippi, the district attorney's office is primarily

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[15]*Loya v. Texas Dept. of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989).

[16]*Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1981, 80 L.Ed.2d 565 (1984); *Supreme Court of Virginia v. Consumers Union, Inc.*, 446 U.S. 719, 736, 100 S.Ct. 1967, 1977, 64 L.Ed.2d 641 (1980); *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134 (5th Cir. 1986); *Holloway*, 765 F.2d at 525.

[17]42 U.S.C. §§ 5101 *et seq.* (1988).

[18]42 U.S.C. §§ 620 *et seq.* (1988).

[19]42 U.S.C. § 5105(b) (1988).

state-funded.[20] Mississippi law extends the scope of the district attorney's authority to statewide concerns: the district attorney has the power to represent the state in all judicial proceedings,[21] even after a change in venue.[22] Chrissy has cited no provision of Mississippi law and adduced no evidence that a district attorney is a local official. We therefore conclude that the Mississippi District Attorney is a state official.

The district court did not enter judgment specifically dismissing Douglass in his official capacity, but its judgment states that any retrospective relief sought against "the State defendants" in their official capacities is barred by the Eleventh Amendment, and we construe this to include any claim against Douglass in his official capacity for damages. Thus construing the judgment, we affirm that portion of it.

IV.

Although the suit names numerous defendants, Chrissy seeks only injunctive and declaratory relief against the majority. The only individual damage claims Chrissy asserts are against D.A. Douglass and four Welfare Department employees: 1) MDPW Commissioner Brittain for his failure to comply with the conditions imposed by order of the California Court, failure to investigate further the report of Dr. McCrary, failure to report the matter to the Youth Court or the District Attorney, and failure to take any other steps to protect Chrissy from abuse; 2) Marion County Welfare Department Supervisor Sharon Whitt for her failure to comply with the California Court's order, failure to investigate or report the allegations of abuse, and failure to take any other steps to protect Chrissy from abuse; 3) Marion County Welfare Department Social Worker Angela Lacy for the same actions, and her knowing preparation for the Youth Court hearing of a report that omitted all references to plausible evidence of abuse; and 4) HCWD Supervisor Jeanette Werbley for her failure to investigate further the reports of Drs. Bradford, McCrary, and Russell, failure to report the

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[20]Miss.Code Ann. § 25-31-33 (Supp. 1990).

[21]*Id.* at § 25-31-11(1).

[22]*Daumer v. State*, 381 So.2d 1014 (Miss. 1980).

matter to MDPW, the Youth Court, or the District Attorney, and failure to take any other steps to protect Chrissy from further abuse.

While the Eleventh Amendment does not bar damage suits against state officials in their individual capacities,[23] the officials may be protected from personal liability by common law immunities. As District Attorney Douglass is entitled to absolute immunity from suit for damages under § 1983 for actions taken as part of his prosecutorial function "in initiating a prosecution and in presenting the State's case."[24] The same common-law immunity also bars liability for claims that relate to his prosecutorial conduct. A prosecutor is entitled to absolute immunity for "quasi-judicial conduct,"[25] including the decision whether to file criminal charges.[26] A prosecutor is not shielded by absolute immunity, however, for all actions taken in his official capacity. For "administrative or investigatory functions that are not an integral part of the judicial process," he is entitled only to the qualified immunity generally available to government officials.[27] Government officials are shielded by qualified immunity from liability for damages under § 1983 so long, but only so long, as their conduct has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known"[28] at the time of the actions.[29]

Chrissy alleges that Douglass injured her by repeatedly failing to report the charge that she had been abused to MPDW as specifically

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[23]*Scheuer v. Rhodes*, 416 U.S. 232, 238, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974).

[24]*Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976).

[25]*Marrero v. Hialeah*, 625 F.2d 499, 510 (5th Cir. 1980).

[26]*Oliver v. Collins*, 904 F.2d 278, 281 (5th Cir. 1990).

[27]*Rykers v. Alford*, 832 F.2d 895, 897 (5th Cir. 1987).

[28]*Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

[29]*Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Pfannstiel v. City of Marion*, 918 F.2d 1178 (5th Cir. 1990).

required by the Youth Court Law,[30] failing to initiate an investigation into her abuse, failing to disclose medical reports of her abuse at the Youth Court, allowing her father to have physical contact with her upon her return from California in violation of the California Court's order, and other extra-prosecutorial acts. Based on our holding in *Ryland v. Shapiro*,[31] the district court correctly found that D.A. Douglass was not entitled to absolute immunity for his extra-prosecutorial acts that interfered with Chrissy's fundamental right of meaningful access to the Youth Courts. While absolute immunity shields the District Attorney from liability for his decision not to prosecute Foxworth, it does not protect him from liability for failure to comply with his obligation to report allegations of abuse to the Youth Court, which, while part of his official duties, is not strictly a "prosecutorial" function. Nor does Douglass's contention that his actions upon Chrissy's return from California were done pursuant to court order gain him the shield of absolute immunity. While judicial officers acting pursuant to court directives have often been protected by absolute immunity,[32] we can discern no such court order in the record before us.

The district court also found that Chrissy's allegations sufficed to charge that both D.A. Douglass and the Welfare Department employees had violated her clearly established right to meaningful access to the courts by failing to report or investigate her allegations of abuse and that therefore neither was entitled to qualified immunity. While denial of the general defense of failure to state a claim is not appealable, we necessarily review the specific parts of the complaint to determine

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[30]§ 43-21-353. Duty to inform the court. (1) Any attorney, . . . social worker, . . . law enforcement officer, or any other person having reasonable cause to suspect that a child . . . [is] an abused child, shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Public Welfare, and immediately a referral shall be made by the Department of Public Welfare to the intake unit and where appropriate to the youth court prosecutor. Miss.Code Ann. (1972 & Supp. 1990).

[31]708 F.2d 967 (5th Cir. 1983).

[32]*Lockhart v. Hoenstine*, 411 F.2d 455, 460 (3d Cir. 1969).

whether they charge conduct violating clearly established federal rights, for the burden of negating that defense is on the plaintiff.[33]

The alleged acts of the defendants from whom damages are sought would, if proved, constitute a violation of Chrissy's clearly established right to access to the Mississippi Youth Court. Meaningful access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition[34] and the Fifth and Fourteenth Amendment due process clauses.[35] In *Ryland v. Shapiro*,[36] we found suppression of relevant evidence from the appropriate investigative authorities to constitute denial of meaningful access to the courts. Similarly, D.A. Douglass's and the Welfare Department employees' alleged failure to report allegations that Chrissy had been abused effectively blocked her access to the Youth Court.

In her complaint, Chrissy also alleges violation of a clearly established Fourteenth Amendment right to protection from the deprivation of her liberty interest in not being abused. The nature of the liberty interest safeguarded by the Fourteenth Amendment, like that of the property interest, is defined at least in part by state law.[37] Chrissy's claim is not, therefore, merely one for enforcement of state law but for the enforcement of a federal constitutional right even though the protected liberty right is defined by state law. Since the relief sought in that part of the district court order now appealed is solely for damages from named individuals in their personal capacities, the claims are not barred by the Supreme Court decision in *Pennhurst State School*

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[33]*Stem v. Ahearn*, 908 F.2d 1, 5-6 (5th Cir. 1990).

[34]*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979).

[35]*Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Mitchum v. Purvis*, 650 F.2d 647 (5th Cir. 1981).

[36]708 F.2d at 967.

[37]*Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Paul v. Davis*, 424 U.S. 693, 710-11, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976); *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983).

& Hospital v. Halderman[38] which held only that, in a suit for an injunction, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself."[39]

In *Taylor by and through Walker v. Ledbetter*[40] the Eleventh Circuit, sitting en banc, held that a child involuntarily placed in a foster home had stated a claim for the denial of both substantive and procedural due process. It based the substantive due process ruling on the existence of a duty owed to the child by the defendant state officials and the procedural due process ruling on a "sufficiently vested claim of entitlement" created by "the statutes and regulations of the state of Georgia."[41]

The Supreme Court's later decision in *DeShaney v. Winnebago County Dep't of Soc. Serv.*[42] held that the substantive component of the Due Process Clause of the Fourteenth Amendment does not of its own force require the state to protect life, liberty, and property against invasion by private actors[43] and confers no affirmative right to governmental aid.[44] The Court noted in *DeShaney* that it would not decide whether the state's child-protection statutes created "an entitlement which would enjoy due process protection against state deprivation" because that issue was raised for the first time in the petitioner's brief to the Court.[45]

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[38]465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67.

[39]*Pennhurst*, 465 U.S. at 117, 104 S.Ct. at 917.

[40]818 F.2d 791 (11th Cir. 1987) (en banc).

[41]*Id.* at 798.

[42]489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

[43]*DeShaney*, 489 U.S. at 195, 109 S.Ct. at 1003.

[44]*Id.*

[45]489 U.S. at 195, n. 2, 109 S.Ct. at 1003, n. 2.

Chrissy charges that the Mississippi statutes created a protected liberty interest. These statutes include provisions that: the Youth Court has "exclusive original jurisdiction in all proceedings concerning . . . an abused child";[46] any attorney, physician, social worker, or law enforcement officer or any other person having reasonable cause to suspect that a child is abused must report orally and in writing to MDPW;[47] MDPW shall immediately refer reports of suspected child abuse to the intake unit of the Youth Court;[48] the intake unit must then promptly make a preliminary inquiry, require MDPW to investigate in depth,[49] and decide whether to recommend that the Youth Court take further steps to protect the child;[50] in every case involving an abused child which results in a judicial proceeding, the Youth Court must appoint a guardian *ad litem* for the child.[51]

The district court did not rule on the due-process claims, there is no Fifth Circuit authority directly on them, and the parties have not fully briefed them on appeal. We therefore intimate no opinion at this time with regard to their merit.

Defendants contend that our recent decision in *Stem v. Ahearn*[52] mandates that, as government employees, they are immune from liability in the present case. In *Stem*, we held that social workers who had petitioned for temporary cessation of a father's visitation rights upon allegations of abuse were entitled to qualified immunity because they had not violated any clearly established law and took action only after the father had been accorded full procedural due process. We did not hold

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[46]Miss.Code Ann. § 43-21-151(1) (1972 & Supp.1990).

[47]*Id.* at § 43-21-353.

[48]*Id.*

[49]*Id.*

[50]*Id.* at § 43-21-357.

[51]*Id.* at § 43-21-121(1)(e).

[52]908 F.2d at 1.

that social workers who, as in this case, allegedly violated clearly delineated federal rights would nonetheless be immune from liability.

DeShaney also creates no precedent with regard to qualified immunity. The court found it unnecessary to consider whether the individual state officials were entitled to a qualified immunity defense because it was denying relief on the merits.[53]

The district court denied Douglass's motion for summary judgment because there were genuine disputes of material facts. Douglass does not contest that conclusion, and, in any event, we agree with it.

For the foregoing reasons, we AFFIRM the district court's judgment denying D.A. Douglass immunity from damages in his individual capacity, save as to actions taken in his prosecutorial role, and denying individual immunity to the Welfare Department employees.

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[53]*DeShaney*, 489 U.S. at 202, n. 10, 109 S.Ct. at 1007, n. 10.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

CHRISSY F., By Her Next Friend And Guardian Ad Litem, DONNA MEDLEY,

Plaintiff,

vs.

MISSISSIPPI DEPARTMENT OF PUBLIC WELFARE; THOMAS H. BRITTIAN, JR., Individually and as Commissioner of the Mississippi Department of Public Welfare; SEBE DALE, JR., Individually and as Chancellor for the Tenth Chancery Court District of Mississippi; GARLAND UPTON, Individually and as Referee of the Marion County Youth Court; RICHARD L. DOUGLAS, Individually and as District Attorney for Marion County, Mississippi; MARION COUNTY WELFARE DEPARTMENT; HANCOCK COUNTY WELFARE DEPARTMENT; JEANETTE WERBEY, as Supervisor of Hancock County Welfare Department; ANGELA LACY, Individually and as Caseworker for Marion County Welfare Department; PHILLIP BROADHEAD; FRED COOPER; TIMOTHY CHARLES FOXWORTH; SHARON WHITT, Individually and as Supervisor of Marion County Welfare Department; and LAMAR BRAXTON, CAROL BURGER, CAROLE HANEY, R.D. HARRIS, WILLIAM REED, KATHERIN SHEPARD, AND JESSIE WEEKS, in their official capacities as members of the State Board of Public Welfare,

Defendants.

No. J88-0340(B).
United States District Court,
S.D. Mississippi
Jackson Division
Dec. 6, 1991.

Daniel S. Mason, Christopher T. Micheletti, Furth Fahrner & Mason, San Francisco, Cal., for plaintiffs.

Sheila Brogna, Children's Law Offices, San Francisco, Cal., for plaintiff.

James F. Steele, Robert G. Jenkins, Office of Atty. Gen., Jackson, Miss., for State defendants.

Thomas D. McNeese, Aultman Tyner McNeese Ruffin, Ltd., Columbia, Miss., for R. Douglass.

Larry O. Norris, P.A., Hattiesburg, Miss., for Timothy C. Foxworth.

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MEMORANDUM OPINION AND ORDER

BARBOUR, Chief Judge.

This matter is on remand pursuant to the order of the United States Court of Appeals for the Fifth Circuit in the case of Chrissy F. v. Mississippi Department of Welfare, et al., 883 F.2d 25 (5th Cir. 1989). Pursuant to that Order, this Court conducted an evidentiary hearing beginning June 10, 1991, on the merits of the Complaint filed in this matter. The Court, having considered the evidence and arguments presented by the parties, renders the following findings of fact and conclusions of law.

I.

FACTS AND PROCEDURAL HISTORY

On May 15, 1981, Dorrie Singley married Defendant Timothy Foxworth in Columbia, Mississippi, a small town located in Marion County, Mississippi. On May 15, 1982, Singley gave birth to Foxworth's daughter, Crystal Marie Foxworth ("Chrissy").

Singley and Foxworth were divorced on November 29, 1984, pursuant to a divorce decree of the Chancery Court of Marion County, Mississippi. The divorce decree granted Singley physical custody of Chrissy and gave Foxworth visitation rights with the child.

Between the date of the divorce decree and March, 1985, cooperation between Singley and Foxworth regarding visitation with Chrissy degenerated substantially. On March 8, 1985, Foxworth filed a motion for citation of contempt in Marion County Chancery Court, asserting that Singley had willfully refused to allow Foxworth to exercise his visitation rights as provided in the divorce decree. Foxworth subsequently amended the motion to include allegations that Singley had moved the child outside of the state of Mississippi, thereby further impeding Foxworth's attempts to visit Chrissy. Foxworth believed that Singley had either remarried or was living with a boyfriend in Texas.

On August 7, 1985, Foxworth's motion for citation of contempt was heard before Defendant Chancellor Sebe Dale, Jr., to whom the

Foxworth divorce and custody matter had been assigned. Judge Dale had not heard the original divorce proceeding between Singley and Foxworth. During the hearing, allegations were made for the first time that Singley would not allow Chrissy to visit with Foxworth because of Singley's belief that Foxworth was sexually abusing the child. On August 22, 1985, Judge Dale entered an order on the motion, finding that Singley was in contempt of the visitation provisions of the court's divorce decree and ordering Singley's incarceration upon her return to the court's jurisdiction.

In May, 1986, Singley returned to Mississippi and took up residence in Bay St. Louis, which is located in Hancock County, Mississippi. She was subsequently arrested for contempt and jailed from July 8 through July 18, 1986, pursuant to Judge Dale's order. Because of Singley's incarceration and the allegations of child sexual abuse that had been raised in the matter, the case received substantial media attention and was on its way toward becoming a cause celebre for those interested in the rights of abused children.

Following her release from jail, Singley sought the assistance of Defendant Richard Douglas, District Attorney for the 15th Judicial District of Mississippi, which includes Marion County and Columbia, Mississippi. Douglas informed Singley that he needed physical evidence of the alleged sexual abuse before he could institute criminal proceedings against Foxworth.

On November 18, 1986, following a visitation period with Foxworth, Chrissy was taken to a hospital emergency room in Hancock County, Mississippi, the county where Singley and her daughter were then residing. Dr. William Bradford examined the child and thereupon filed a "Report of Suspected Battered Child" regarding Chrissy with the Hancock County Welfare Department. In his report, Dr. Bradford noted physical symptoms that suggested Chrissy may have been sexually abused. Dr. Bradford recommended to Singley that she seek follow-up assistance from the Mississippi Department of Public Welfare.

On November 19, 1986, Singley met with Bridget Logan of the Hancock County Welfare Department to discuss the suspected sexual abuse noted in Dr. Bradford's report. Logan interviewed Singley and Chrissy individually and recommended that Chrissy be examined by a pediatrician experienced in child sexual abuse cases.

On November 25, 1986, Logan accompanied Singley to the office of Dr. R. Bryant McCrary, the pediatrician whom Logan had recommended to Singley. Following his examination of Chrissy, Dr. McCrary filed a "Report of Suspected Battered Child" with the Hancock County Welfare Department in which he stated that his findings were "very suspicious of child abuse." While still at Dr. McCrary's office, Logan telephoned Judge Dale's office to inform him of the findings made by Drs. Bradford and McCrary. However, no action was taken at that time to suspend or otherwise modify Chrissy's visitation with Foxworth.

On November 26, 1986, Chrissy was interviewed by Margaret Alfonso, Assistant District Attorney for Hancock County, Mississippi, who had been notified of Chrissy's case by Dr. McCrary. On December 1, 1986, Alfonso wrote to Marion County District Attorney Douglas, noting that she had interviewed Chrissy, that Chrissy had told her of specific acts of molestation that had occurred during her visits to Columbia, Mississippi, with Foxworth, and that criminal prosecution of Foxworth should be considered based on the strength of the evidence.

On December 3, 1986, Garnett Harrison, the attorney Singley had retained at the recommendation of Alfonso, sent the medical reports of Drs. Bradford and McCrary to Mason Sistrunk, an investigator in the Marion County District Attorney's Office. Harrison also wrote to Logan and requested that she file an abuse petition in Hancock County, the county in which Singley and Chrissy resided. However, Logan advised Harrison that the matter needed to be handled in Marion County Chancery Court and that any Youth Court action that might be appropriate would also need to be initiated in Marion County. Logan further informed Harrison that this information had been relayed to Sistrunk in the Marion County District Attorney's Office.

On December 10, 1986, Singley met with Gary Arthur, a case worker with the Marion County Welfare Department. At that meeting, Singley provided Arthur with copies of the reports of Drs. Bradford and McCrary and a copy of Alfonso's December 1, 1986, letter to Douglas. Arthur interviewed Chrissy about the alleged sexual abuse, but she was unable to verbalize the alleged incidents other than to say, "Daddy did it."

On December 11, 1986, Arthur prepared a "Report of Suspected Battered Child" form and sent it to District Attorney Douglas and the Marion County Sheriff's Department to inform them that the Marion County Welfare Department was investigating the Foxworth matter. On December 12, 1986, Arthur prepared an investigation report which indicated that Arthur had been told by Marion County Attorney Forrest Dantin that the matter would be handled by Judge Dale in Chancery Court as a custody matter rather than in Youth Court. The report also indicated that Arthur was told by Judge Dale that this matter would be handled in Chancery Court. Accordingly, Arthur closed the Marion County Welfare Department case file on Chrissy.

On December 17, 1986, Foxworth filed a motion in Chancery Court to modify the custody provisions regarding Chrissy so that paramount custody of Chrissy would be vested with Foxworth. In furtherance of his motion, Foxworth arranged to have Chrissy interviewed by a psychologist, Dr. Franklin Jones.

On June 15, 1987, Singley filed a counterclaim for modification of the divorce decree, alleging that Foxworth had sexually abused Chrissy and seeking a modification of the divorce decree to include supervised visitation by Foxworth, counseling, and payment of medical expenses. Singley also moved the Chancery Court for the appointment of a guardian ad litem for Chrissy.

On June 22, 1987, Judge Dale held a hearing to review the requests for modifications to the custody orders regarding Chrissy. On August 4, 1987, Judge Dale issued an opinion and order finding that Singley was not a credible witness, that allegations of Foxworth's abusing Chrissy were not proven, that Singley was not providing Chrissy with a proper home, and that the prior custody order should be modified so that paramount custody of Chrissy be vested with Foxworth. Following entry of the order, Singley did not surrender Chrissy to Foxworth's care.

On August 10, 1987, Singley took Chrissy to Children's Hospital in New Orleans, Louisiana, where Chrissy was examined by Dr. Rebecca Russell, a licensed physician who was specifically trained in the area of child sexual abuse. Based on her examination of Chrissy, Dr. Russell concluded that several of the physical findings could only be caused by sexual molestation. Based on Dr. Russell's findings, Singley

immediately moved the Chancery Court for a new trial or, in the alternative, for supersedeas bond. That motion was summarily denied by Judge Dale.

On August 17, 1987, Foxworth filed a petition for contempt, alleging that Singley had failed to turn Chrissy over to Foxworth as required by the August 4 custody modification.

On August 18, 1987, attorney Harrison noticed the deposition of Dr. Russell. Foxworth moved for and was granted a protective order prohibiting the taking of Dr. Russell's deposition. However, the deposition of Dr. Russell was subsequently taken by Harrison on August 23, 1987. Singley thereafter filed with the Chancery Court a motion to reopen the custody hearing in Chancery Court, a second motion for appointment of a guardian ad litem, and a motion to recuse directed at Judge Dale. Singley also filed an emergency appeal and supersedeas bond with the Mississippi Supreme Court, seeking to have the custody modifications overturned.

On August 28, 1987, a hearing was held on Foxworth's petition for contempt. At the hearing, Judge Dale received, but refused to admit as evidence or otherwise consider, a copy of Dr. Russell's report.[54] Judge Dale found Singley to be in contempt of court for failure to turn over physical custody of Chrissy to Foxworth. Singley did not appear at the hearing and had in fact gone into hiding with Chrissy in defiance of the orders of the Chancery Court.

On September 23, 1987, Singley's petition for emergency hearing and extraordinary relief was denied by the Mississippi Supreme Court. Singley's attorney thereupon filed a certificate of appeal to the Mississippi Supreme Court.

On October 7, 1987, Judge Dale entered an order nunc pro tunc denying Singley's motions to reopen the case, to appoint a guardian ad litem, and to recuse.

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[54]A copy of the Russell report had also been furnished to District Attorney Douglas at this time in support of the criminal investigation Singley and her attorney continued to urge against Foxworth.

On October 14, 1987, Singley was admitted to Charity Hospital in New Orleans, Louisiana under an assumed name. She died later that day from a brain aneurism. Chrissy's location was still unknown at that time to Foxworth.

In late October, 1987, attorney Harrison sent a copy of the Russell report to Bridget Logan, the Hancock County Welfare Department worker who had first handled the sexual abuse charges concerning Chrissy. Harrison asked Logan to file a petition on Chrissy's behalf in Hancock County. Logan discussed the matter with her supervisor, Defendant Jeanette Werbey. However, no petition was filed and no further investigation of the matter was conducted.

On December 5, 1987, Donna Medley, director of the San Francisco Victim Witness Assistance Program and Chrissy's next friend in this proceeding, received a phone call from Gail Martin, a paralegal who worked for Harrison in her Gulfport, Mississippi, office. Martin informed Medley that she was at the San Francisco airport with Chrissy and needed to bring Chrissy before juvenile authorities in California. Medley contacted an attorney with Legal Services for Children and requested that Chrissy be brought before Child Protective Services, San Francisco Department of Social Services, and other juvenile authorities as soon as possible.

On December 10, 1987, Medley and her attorney met with Judge Daniel Weinstein of the San Francisco Juvenile Court to discuss Chrissy's case. The following day, the San Francisco Department of Social Services filed a petition on Chrissy's behalf in San Francisco Juvenile Court, alleging that Chrissy would be at risk for abuse if returned to the custody of Foxworth. Judge Weinstein thereupon signed a detention order, finding that an urgent and immediate need existed to ensure Chrissy's protection, and Chrissy was placed under the temporary custody of the Department of Social Services in Medley's home. Foxworth was then notified by the San Francisco Department of Social Services that Chrissy had been taken into protective custody in San Francisco. This was the first time Foxworth was aware of the location of his daughter since her disappearance in mid-August.

At a hearing on December 14, 1987, Judge Weinstein ordered a physical and psychological examination of Chrissy by Dr. Graeme Hanson. The court also agreed to assert temporary jurisdiction over the

matter until such time as factual and legal findings pertinent to the jurisdictional issue could be made.

On December 15, 1987, Judge Dale entered an order in a matter styled "In the Interest of Crystal Marie Foxworth, Minor," which directed District Attorney Douglas to travel to San Francisco, obtain custody of Chrissy, and return her to Mississippi. No cause number appeared on the order, which was purportedly entered in the Chancery Court of Marion County, Mississippi, Youth Court Division. On that same date, Marilyn Willard, a child welfare supervisor with the Department of Social Services in San Francisco, spoke with Defendant Sharon Whitt, supervisor for the Marion County Welfare Department, to inquire about possible placement of Chrissy if she were to be returned to Mississippi. Whitt informed Willard that Defendant Thomas Brittian, the Commissioner of the Mississippi Department of Public Welfare, was personally supervising the Department's efforts to assist in the Foxworth matter.

On December 16, 1987, Judge Weinstein spoke directly with both Judge Dale and Brittian concerning Chrissy's status and the circumstances under which Chrissy might be returned to Mississippi. Both Judge Dale and Brittian assured Judge Weinstein that Chrissy would undergo physical and psychological evaluation if she were returned to Mississippi, that she would be placed in a neutral environment upon her return, that a youth court petition would be filed on her behalf, and that a guardian ad litem would be appointed to ensure that her interests were legally protected. Judge Dale specifically informed Judge Weinstein that a petition had been filed in Marion County Youth Court that day on Chrissy's behalf. Judge Weinstein also spoke with Dr. Hanson, who had completed his preliminary evaluation of Chrissy. Dr. Hanson reported that, although he could not make a conclusive finding as to molestation, there was enough evidence to warrant an extensive evaluation of Chrissy in order to determine if any sexual abuse had occurred. Dr. Hanson suggested that the evaluation should be made in a neutral setting where Chrissy would not be under any strong pressures from any particular party.

Following his communications with Judge Dale, Brittian, and Dr. Hanson, Judge Weinstein presided over a contested hearing to determine if Chrissy should be detained in California or returned to the jurisdiction of the Mississippi court. District Attorney Douglas appeared

at that hearing and agreed that, in addition to the representations made by Judge Dale and Brittian, he would support the appointment of a competent guardian ad litem for Chrissy. In addition to Douglas, attorneys for Foxworth were present at the hearing and were apprised of all considerations relevant to Chrissy's possible return to Mississippi.

On December 16, 1987, Judge Weinstein entered an order declining to exercise jurisdiction over Chrissy. Judge Weinstein noted that his decision was partially based on representations made to him by Mississippi officials that Chrissy's legal interests would be protected if she returned to Mississippi. Accordingly, Judge Weinstein declined jurisdiction and placed the temporary custody of Chrissy with Douglas on the following conditions:

> a. that the minor be placed, upon her arrival in Mississippi, in a neutral, stable setting and not with any maternal or paternal relatives;
>
> b. that the minor be physically and psychologically or psychiatrically evaluated and that all treatment recommendations be followed through with;
>
> c. that the minor be appointed a guardian ad litem who will be a qualified attorney at law to represent the best interests of the child;
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> d. that the Mississippi Department of Welfare has initiated and filed a petition on behalf of the minor in order to insure her protection and detention in a neutral setting; and
>
> e. no contact with father until further order of the Mississippi Court.

On the day that the California court issued the order allowing Chrissy's return to Mississippi, Defendant Angela Lacy, a social worker with the Marion County Welfare Department, received a call from Family and Children Services in Lawrence County, Mississippi, informing her that a long-term foster home for Chrissy had been arranged in Monticello, Mississippi. This information was relayed to Judge Dale's office and to Willard in the San Francisco Department of Social Services.

On December 17, 1987, Chrissy returned to Mississippi with Douglas. Concurrently with Chrissy's return, several matters were taken up in both Marion County Chancery Court and Marion County Youth Court relating to the custody issue. Judge Dale issued a temporary order in the divorce proceedings stating that the Chancery Court deemed it to be in the best interests of the child to have her physical, mental, and emotional status evaluated "by competent professionals and under the direction of the Court" prior to physical custody of the child being turned over to Foxworth. Judge Dale further ordered that it would be most expedient "to utilize the machinery of the Youth Court Division of this Court[55] to accomplish the aforesaid purposes of examination and evaluation and possible treatment." Accordingly, the August 4, 1987, order granting Foxworth physical custody of Chrissy was held in abeyance until such time as the Youth Court had concluded its proceedings.

In addition to the orders issued in Chancery Court by Judge Dale, other actions relating to Chrissy were taken on December 17 in Marion County Youth Court by Defendant Garland Upton, who served as the Marion County Youth Court referee.[56] Referee Upton appointed Defendants Phillip W. Broadhead and Fred Cooper, the public defenders for Marion County, as guardians ad litem for Chrissy in the Youth Court proceeding. In addition, it was further ordered that temporary physical custody of Chrissy be placed in a private home approved by the Youth Court and that Chrissy be examined by physician Dr. S. Kimble

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[55]In Mississippi counties such as Marion County which have no family court or county court, the youth court is administered as a division of the chancery court, and chancery judges serve as youth court judges for those jurisdictions. Miss. Code Ann. § 43-21-107(3) (1972). If chancery judges do not wish to personally adjudicate juvenile matters filed within the youth court division of the court, they may appoint referees to act in such cases. Miss. Code Ann. § 42-21-111(1) (1972). Hearings before a youth court referee proceed in the same manner as hearings before a youth court judge, and the referee possesses all powers and performs all duties of a youth court judge in all hearings he is authorized to hear. Miss. Code Ann. § 43-21-111(3) (1972).

[56]Referee Upton had previously represented Foxworth in a prior divorce proceeding, yet this information was never disclosed to any of the parties involved in the Youth Court proceeding. Upton testified that this representation had occurred several years before, had involved routine matters, and that at the time of the youth court proceeding, he had forgotten his prior representation of Foxworth.

Love and psychologist Dr. Franklin D. Jones, who were then to report the findings of such examinations and evaluations to the court.[57]

Douglas brought Chrissy home to Mississippi on December 17 and she remained in Douglas' custody at his home. On the evening of her return, Foxworth called the Douglas home, but was not allowed to speak with Chrissy. Later that same night, Chrissy asked to speak with Foxworth, and a telephone conversation was arranged. Thereafter, Foxworth, Foxworth's mother Jeanette Hathorn, and a paternal aunt were allowed to visit Chrissy in the Douglas home. During the visit, which lasted approximately forty-five minutes to one hour, Douglas and members of his family were physically present at all times in the room with Chrissy and her relatives. Douglas testified that during the visit, Chrissy was reticent at first, but that she never showed any signs of fear or dislike toward Foxworth.

On December 18, 1987, Douglas took Chrissy to Judge Dale's chambers, where Judge Dale ordered evaluations of Chrissy by Drs. Jones and Love. Neither Youth Court referee Upton nor the guardians ad litem Broadhead and Cooper were notified or present during this proceeding. At Judge Dale's oral direction, Douglas and Defendant Angela Lacy, the Marion County Welfare Department case worker who had been assigned to the Foxworth matter, took Chrissy to Hattiesburg, Mississippi, for examination. Following the recommendations contained in the reports of Drs. Jones and Love which stated that there was no evidence to suggest that Chrissy been sexually abused, Judge Dale placed Chrissy that day in the home of her paternal grandmother Hathorn, with unlimited visitation by Foxworth.

On December 23, 1987, Marion County social worker Lacy met with Judge Dale to discuss Lacy's reports concerning visits she had made to the Hathorn home since Chrissy has been placed there. Lacy's notes reflect that Judge Dale informed her that he planned to give Foxworth legal custody of Chrissy. Lacy recommended, and Judge Dale agreed, that Chrissy should remain in Hathorn's care and that Foxworth should continue to have unlimited visitation with her. Judge Dale also

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[57]Both Dr. Love and Dr. Jones had examined Chrissy previously at Foxworth's request. On those occasions, neither doctor had found any evidence to suggest that Chrissy had been sexually abused.

assured Lacy that he would enter her report in the pending Youth Court proceeding involving Chrissy.

Also on December 23, 1987, a hearing was held before Judge Weinstein in California concerning a final dismissal of the California petition that had been filed on Chrissy's behalf. Because of reservations as to whether Mississippi authorities had complied with the conditions under which Chrissy was returned to Mississippi, Judge Weinstein refused to dismiss the petition at that time.

On December 28, 1987, Chrissy's maternal grandfather and great-grandmother filed a petition in Chancery Court seeking custody of Chrissy or, in the alternative, visitation rights with her.

On December 30, 1987, referee Upton presided over a hearing on the Youth Court petition that had been filed on Chrissy's behalf. Present at the hearing were County Attorney Dantin, District Attorney Douglas, Judge Dale, guardians ad litem Broadhead and Cooper, and Foxworth's attorney. Chrissy's maternal grandfather and great-grandmother who had earlier filed a Chancery Court petition for custody were not notified of the Youth Court proceeding. Although no record of the Youth Court proceeding was made, the final judgment issued by referee Upton reflects that the evidence offered at the hearing consisted of Dr. Love's report of his December 18, 1987, physical examination of Chrissy which "disclosed no evidence that said child had been sexually abused"; Dr. Jones' report of his December 18, 1987, psychiatric examination of Chrissy which "disclosed no evidence that said child had been sexually abused"; Lacy's investigative report, which reported that a good relationship appeared to exist between Chrissy and her father and recommended that a father-mother relationship be sustained for Chrissy by Foxworth and Hathorn; and Douglas' statement that he had interviewed Chrissy on December 29, 1987, at which time she emphatically denied having been abused or molested in any way by Foxworth. The reports of Drs. Bradford, McCrary, and Russell were not offered into evidence by any party to the Youth Court proceeding. Neither of the guardians ad litem, Broadhead or Cooper, attempted to bring such evidence to the attention of the court, nor did they independently attempt to obtain any evidence regarding the alleged abuse prior to the hearing. In addition, Broadhead and Cooper failed to review any of the documents contained in the court file for the Singley-Foxworth divorce proceeding.

Referee Upton entered a judgment following the hearing in which he remanded the Youth Court petition to the files and entered a report and recommendation to the Chancery Court. Specifically, referee Upton recommended that the Chancery Court modify its custody orders regarding Chrissy as it judged necessary to ensure that Chrissy remained in the legal custody of Foxworth, but was cared for on a day-to-day basis by Hathorn.

On December 31, 1987, Judge Dale entered an addendum to final judgment in the Chancery Court divorce proceeding which implemented the Youth Court's recommendation that Chrissy remain in Foxworth's legal custody and that day-to-day care be provided by Hathorn.

On January 26, 1988, Judge Weinstein entered an order formally appointing Donna Medley guardian ad litem for Chrissy in the California proceeding.

On February 3, 1988, a hearing was held before Judge Dale on the motion of Chrissy's maternal grandfather and great-grandmother seeking custody or visitation rights. In a judgment on the petition entered March 9, 1988, Judge Dale found that the petitioners were not entitled to custody of Chrissy. In addition, Judge Dale ruled that permissive visitation might be appropriate between Chrissy and the petitioners at some point in the future, but that such visitation would not be allowed until the Court was satisfied that there no longer existed any reasonable threat to Chrissy's safety, stability, and normalcy because of the continuing activities of the California children's group which continued to prosecute a petition on Chrissy's behalf in the California court.

On February 12, 1988, Judge Dale entered a final status order in the divorce proceeding. In that order, Judge Dale noted that, based on Judge Weinstein's decision to decline jurisdiction over proceedings concerning Chrissy, the Mississippi court would consider any directions, instructions, requirements, and conditions imposed by the California court to be of no legal force. In addition, Judge Dale asked the California court to dismiss the petition filed in that state in Chrissy's behalf.

On July 8, 1988, the instant action was filed pursuant to 42 U.S.C. § 1983. In the Complaint, Plaintiff alleged that Defendants violated and/or were violating Chrissy's substantive and procedural due process

rights as guaranteed by the fourteenth amendment to the United States Constitution. Plaintiff also alleged violations of federal statutory rights conferred upon Chrissy by the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq. ("CAPTA"). Finally, Plaintiff's Complaint contained certain pendent state law claims.

On August 26, 1988, this Court dismissed Plaintiff's suit pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, finding that the federal suit was "inextricably intertwined" with the state court proceeding. The United States Court of Appeals for the Fifth Circuit reversed that ruling, however, and directed this Court to appoint a guardian ad litem or "next friend" for Chrissy or enter a finding that Chrissy's interests were adequately protected without such an appointment. Chrissy F. v. Mississippi Dept. of Public Welfare, et al., 883 F.2d 25, 27 (5th Cir. 1989). Following a contested evidentiary hearing on December 13, 1989, this Court appointed Medley as Chrissy's next friend. Following discovery in this matter, Defendants filed various motions to dismiss and/or for summary judgment, largely premised upon the eleventh amendment to the United States Constitution and claims of absolute and qualified immunity. On April 27, 1990, this Court granted in part and denied in part Defendants' motions. Specifically, the Court found that the eleventh amendment rendered the state and all of the individual Defendants immune from damages in their official capacities; that the guardians ad litem were entitled to absolute immunity; that Defendant Douglas was not entitled to absolute immunity as to all claims asserted in the Complaint; and that the other state officials were not conclusively entitled to qualified immunity. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed this Court's ruling in all respects. Chrissy F. v. Mississippi Dept. of Public Welfare, et al., 925 F.2d 844, 850 (5th Cir. 1991). Subsequently, a trial on the merits was commenced in this Court on June 10, 1991.

Since her return to Mississippi in December of 1987, Chrissy has been living in the homes of her paternal grandmother and her father. Foxworth works a rotating schedule as an off-shore oil worker. During the periods that he is working, Chrissy lives with her grandmother at her home. When Foxworth is not working, both Chrissy and her grandmother stay with Foxworth at his home. During the time that Angela Lacy supervised the situation on a regular basis, she reported that Chrissy was adjusting well and no problems were apparent.

Chrissy's grandmother testified that Chrissy has adjusted well, is liked by her schoolmates, makes good grades, and attends church with her and Foxworth on a regular basis.

II.

CONCLUSIONS OF LAW

The following issues of law are presented in the instant case: (a) whether Plaintiff has established a claim for relief under 42 U.S.C. § 1983 as to all named defendants; (b) whether Plaintiff has established a deprivation of Chrissy's substantive due process rights to liberty and personal safety and to have access to courts as guaranteed by the fourteenth amendment to the United States Constitution; (c) whether Plaintiff has established a violation of Chrissy's procedural due process rights as guaranteed by the fourteenth amendment to the United States Constitution; (d) whether a private right of action that may be enforced pursuant to section 1983 exists under the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq. ("CAPTA") and, if so, whether Plaintiff has established a violation of any such rights that CAPTA may have conferred upon Chrissy; and (e) whether Plaintiff has established a right to recover on pendent state law claims asserted in the Complaint.

A. Elements of a Section 1983 Action

Before addressing the substantive claims asserted by Plaintiff, the Court, in light of the fact that all of Plaintiff's claims with the exception of certain pendent state law claims have been brought pursuant to section 1983, will initially consider whether Plaintiff has established a claim for relief under section 1983 as to certain of the named defendants. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 expressly authorizes a court to grant relief only when a party's federally protected rights have been violated by a person acting under color of state law. Thus, in determining whether a section 1983 claim has been properly asserted, the court must consider who is a "person" subject to suit under section 1983 and when a deprivation of federal rights occurs under "color of state law."

Keeping the above noted factors in mind, the Court now considers whether the requisites for maintaining a section 1983 action have been met as to certain of the defendants named in this action. With regard to the issue of who constitutes a "person" that may properly be named a section 1983 defendant, the United States Supreme Court held in Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989), that states and state agencies are not considered "persons" subject to suit under section 1993. See also Howlett v. Rose, 110 S.Ct. 2430, 2437 (1990) (noting that traditional notions of eleventh amendment immunity support conclusion that states and state agencies are not subject to suit under Section 1983); Weller v. Department of Social Services, 901 F.2d 387, 398 (4th Cir. 1990). The Court therefore finds that a section 1983 action cannot be maintained against the Mississippi Department of Public Welfare. Accordingly, that Defendant is hereby dismissed from this lawsuit.

The Court next considers whether Plaintiff has established that certain of the Defendants were acting "under color of state law" at the time that the alleged deprivations of rights occurred.

Public employees act under color of state law while they are acting in their official capacities or while they are exercising their responsibilities pursuant to state law. See, e.g., West v. Atkins, 487 U.S. 42, 50 (1988); DeYoung v. Patten, 898 F.2d 628, 631 (8th Cir. 1990). Accordingly, the Court finds that the alleged actions of Defendants Brittian, Dale, Upton, Douglas, Werbey, Lacy, and Whitt clearly fall within the parameters of acts considered to be taken under color of state law. The Court finds, however, that Defendants Cooper and Broadhead should be distinguished from other public official Defendants. In Meeker v. Ketcher, 782 F.2d 153 (10th Cir. 1986), the court found that a guardian ad litem, although a public employee, was

not acting under color of state law for purposes of section 1983 while representing a minor in a state court proceeding concerning abuse or neglect. Because a guardian ad litem owes a duty to the minor to promote and protect the minor's best interests and must exercise independent professional judgment in carrying out that duty, a guardian ad litem does not function as a representative of the state while acting on behalf of his client. Meeker, 782 F.2d at 155. Accordingly, the Meeker court concluded that a guardian ad litem is not acting under color of state law for the purposes of section 1983. Id.; see also Clay v. Friedman, 541 F.Supp. 500, 503-04 (N.D.Ill. 1982). This Court likewise concludes that, based on the reasoning expressed in Meeker and similar cases, Defendants Cooper and Broadhead were not acting under color of state law with regard to incidents relevant to this controversy and should therefore be dismissed as defendants in this lawsuit.

Finally, the Court considers whether Plaintiff has satisfied the color of state law requirement as to Defendant Foxworth. Plaintiff contends that Foxworth, while nominally a private party, became a state actor for purposes of section 1983 because of his involvement, through his attorneys, in the California court proceeding and in the Youth Court proceeding that took place in Marion County, Mississippi. While this Court is cognizant of the general precept that private individuals who jointly engage with state actors in a prohibited action may be considered acting under color of state law for purposes of section 1983, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (citing United States v. Price, 383 U.S. 787, 794 (1966)), the Court is also cognizant of numerous rulings which have held that a private party does not act under color of state law merely because of his participation in a judicial proceeding. See Brisco v. LaHue, 460 U.S. 325, 329-30 (1983); Dunwoody Homeowners Asso. v. DeKalb County, 887 F.2d 1455, 1461 (11th Cir. 1989); Tunstall v. Office of Judicial Support of Court of Common Pleas, 820 F.2d 631, 634 (3rd Cir. 1987); Earnest v. Lowentritt, 690 F.2d 1198, 1200 (5th Cir. 1982); Mabe v. Galveston Park Bd., 635 F. Supp. 105, 107 (S.D. Tex. 1986). Based on the rationale expressed in these cases, the Court concludes that Defendant Foxworth was not acting under color of state law merely because of his

involvement in the court proceedings at issue here.[58] Plaintiff contends that the holding in Edmonson v. Leesville Concrete Co., 500 U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) requires a finding of state action on the part of Defendant Foxworth. The Court cannot agree. In Edmonson, the United States Supreme Court found state action on the part of a private litigant because of that litigant's exercise of peremptory challenges in a civil proceeding. Noting that peremptory challenges could not be exercised without the overt, significant assistance of the court and that exercise of the peremptory challenge involved the performance of a traditional governmental function in that the selection of a jury was in essence the selection of individuals who would exercise the power of the court, the Court concluded that the exercise of peremptory challenges was of such a governmental character that it could be deemed state action. Edmonson, 114 L.Ed.2d at 673-78. The Court does not find those same factors to be present in the instant matter. Plaintiff has failed to establish any overt, significant assistance to Foxworth by state officials with regard to the judicial proceedings at issue other than the lone fact that the state provided a forum in which such proceedings could occur. The mere fact that Foxworth participated in the proceedings is wholly insufficient to characterize him as a state actor. Additionally, the Court finds that Plaintiff has failed to produce any evidence which suggests that Foxworth performed any act which could even remotely be construed as a traditional governmental function. Unlike Edmonson, where a private litigant actively participated in selecting those individuals who as a jury would ultimately exercise the powers and authority of the court, the facts here suggest only that Foxworth was given his day in court. This Court simply does not read Edmonson as an opening of the section 1983 door against all litigants in state court judicial proceedings merely because of their participation in lawsuits. The Court concludes that Foxworth is not a state actor for purposes of section 1983 and should therefore be dismissed as a Defendant in this lawsuit.

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[58]Foxworth was a party of record in the chancery court divorce and custody case. Pursuant to Miss. Code Ann. § 43-21-203(6) (1972), Foxworth was allowed to appear as an interested party in the youth court proceeding. Although the exact nature of Foxworth's status in the California court proceeding is unclear, the record demonstrates that Foxworth's attorney was allowed to participate in that proceeding.

B. Substantive Due Process Claims

The fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deprive a person of life, liberty or property without due process of law." U.S. Const. amend. XIV §1. In order to establish a substantive due process claim under section 1983, Plaintiff must assert a recognized liberty or property interest within the purview of the fourteenth amendment, see Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Neuwirth v. Louisiana State Board of Dentistry, 845 F.2d 553, 557 (5th Cir. 1988), and that she was intentionally or recklessly deprived of that interest under color of state law. See Daniels v. Williams, 474 U.S. 327, 327 (1986); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Brantley v. Surles, 718 F.2d 1354, 1357 (5th Cir. 1983).

(1) liberty interests and constitutionally protected rights to personal safety

Plaintiff initially asserts a substantive due process claim on the basis that her liberty interest in remaining free from personal harm has been intentionally and/or recklessly violated by Defendants Dale, Douglas, and Brittian. By affirmatively acting to obtain custody of Chrissy from California authorities and then allowing an allegedly inadequate and incompetent evaluation of the allegations of abuse and allowing Foxworth access to Chrissy, Plaintiff contends that these Defendants rendered Chrissy unable to care for herself and rendered her more vulnerable to the danger of abuse by Foxworth, thereby violating Chrissy's liberty interest in personal safety as guaranteed by the due process clause.

Analysis of a claim that state officials failed to adequately protect an individual from a risk of harm must begin with DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). In DeShaney, the Supreme Court determined that the due process clause of the fourteenth amendment does not impose an obligation upon public authorities to protect children from parental abuse, even when they know that a child is threatened with harm and may have undertaken some protective measures on the child's behalf. DeShaney, 489 U.S. at 201-02. Because the due process clause operates as a limitation on the power of the state to act and does not serve as a guarantee of certain minimal levels of safety and security, the Court concluded that the

provision could not be extended to impose an affirmative obligation on the state to protect individuals from the risk of harm posed by other private citizens. Id. at 195-96.

DeShaney itself recognized that certain exceptions may exist to this general principle of no duty to protect, and it is these exceptions that Plaintiff asserts as a basis for her substantive due process claims. It has long been recognized, and the DeShaney court reaffirmed, that the state does have a constitutional obligation to protect and care for individuals that are in the custody of the state.[59] See id. at 198-200; see also Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983) (holding that due process requires state to provide medical care to suspects in police custody); Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that state has an affirmative duty under substantive component of due process clause to provide involuntarily committed mental patients with services that are necessary to ensure their safety); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding that state is required under due process to provide prisoners with adequate medical care). Because the deprivation of rights in DeShaney occurred after the state had relinquished custody of the child at issue, the Court concluded that the duty to protect which may arise in a custodial setting no longer existed, thus relieving the state of its duty to ensure the safety and well-being of a private individual. Most relevant for our purposes, however, are the circumstances which the Court noted in determining that the state's duty to protect had ceased with the relinquishment of custody:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took

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[59]Plaintiff has continually stressed to the Court that another, exception to the general principle of no duty to protect exists where a "special relationship" exists between the state and the individual in question. Where the state knows that an individual faces a particular risk of harm and in fact may have undertaken certain actions to protect the individual from that harm, Plaintiff asserts that a "special relationship" arises which creates a duty on the part of the state to protect the individual from the known danger. The DeShaney court flatly rejected this argument, noting that a duty to protect under these circumstances can arise only where the custody exception itself is applicable. DeShaney, 489 U.S. at 197-98.

> temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that which he would have been in had it not acted at all.

DeShaney, 489 U.S. at 201. Based on this language, Plaintiff asserts that, although state custody of Chrissy was relinquished soon after her return from California, those Defendants responsible for her return to Mississippi still retained a duty to protect her because they enhanced the potential for harm by removing her from psychological and medical services she could have received in California and by placing her in closer proximity to her alleged abuser. This Court does not agree. While the state may in fact hold a duty towards those individuals it has placed at an increased risk of harm and, in effect, "must protect those it throws into snake pits," Walker v. Rowe, 791 F.2d 507, 511 (7th Cir. 1986), Plaintiff has failed to establish that Chrissy actually suffered any concrete injury or harm as a result of her return to Mississippi or to the custody of her grandmother and father. Plaintiff has never contended at any point in this proceeding that Chrissy was subjected to any sexual or physical abuse subsequent to her return to Mississippi, and this Court finds no evidence to even remotely suggest that any such instances may have occurred. As to psychological harm, testimony has been presented to this Court which establishes in general terms that sexually abused children may suffer psychological injury if returned to the custody of the alleged abuser or if denied adequate counseling and treatment subsequent to the abuse. This Court has no doubt that such damage does indeed occur. The facts, however, do not demonstrate this to be the result in the instant matter. The evidence indicates that, following a period of observation and counseling by social workers and psychologists, Chrissy has developed into a normal, well adjusted child by all outward manifestations. She has excelled as a student since starting school and exhibits no difficulty in relating to other children. She has likewise developed a strong attachment to her family, particularly her maternal grandmother, and does not exhibit any discomfort with or disturbance under her current living arrangement or family structure. Finally, the Court notes with great significance that psychologists treating Chrissy have determined that she is no longer in need of treatment and have in fact released her from their care. On the basis of this evidence, the Court simply cannot find that Chrissy's return to Mississippi placed her at an enhanced risk of physical or psychological harm since no such harm has actually occurred. Accordingly, the Court concludes that

Plaintiff has failed to establish the deprivation of a liberty interest in personal safety within the purview of the due process clause.

(2) right of access to courts

The right to present a claim before a court of law is basic to our system of government and is, consequently, one of the most fundamental rights protected by the United States Constitution. As characterized by the United States Supreme Court in Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142 (1907),

> [t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers, 207 U.S. at 148 (citations omitted). While the Chambers court viewed the right of access to courts as one of the privileges and immunities accorded under Article IV of the Constitution, other courts have determined the right to also be grounded in the first amendment right to petition[60] and in the due process clause of the fourteenth amendment.[61]

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[60]See California Motor Transportation Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); NAACP v. Button, 371 U.S. 415, 428-29 (1963); Ryland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1363 (5th Cir. 1983); Wilson v. Thompson, 593 F.2d 1375, 1387 (5th Cir. 1979); American Civil Liberties Union, Inc. v. Mabus, 719 F.Supp. 1345, 1358 (S.D. Miss. 1989).

[61]See Bounds v. Smith, 430 U.S. 817, 821-22 (1977); Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971); Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Mitchum v. Purvis, 650 F.2d 647, 648 (5th Cir. 1981); Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979).

The right of access to courts requires that an individual have "adequate, effective, and meaningful" access to court procedures. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983); see also Bounds v. Smith, 430 U.S. 817, 822 (1977); Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979). On that basis, courts have found various acts of delay in court proceedings and suppression or destruction of evidence to constitute an impermissible burden on the right of access to courts. See Germany v. Vance, 868 F.2d 9, 15 (1st Cir. 1989) (intentional suppression of evidence infringes upon protected right of access to courts); Jackson v. Procunier, 789 F.2d 307, 311 (5th Cir. 1986) ("Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation"); Bell v. Milwaukee, 746 F.2d 1205, 1260-63 (7th Cir. 1984) (withholding evidence that would allow an individual to prove his claim violates right of access); Ryland v. Shapiro, 708 F.2d 967, 973 (5th Cir. 1983) (conduct which interferes with the right to institute a suit constitutes actionable impediment to right of access); Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980) (conduct by state officers which delays appellate process may prejudice right of access to courts); McCray v. Maryland, 456 F.2d 1, 6 (4th Cir. 1972) (right of access violated where court official, by refusal or neglect, impedes the filing of court papers); Sigafus v. Brown, 416 F.2d 105, 107 (7th Cir. 1969) (destruction of legal papers necessary for appeal constitutes denial of access); Crews v. Petrosky, 509 F.Supp. 1199, 1204 (W.D. Pa. 1981) (allegation that clerk of court delayed filing of a petition for appeal may state valid claim for violation of right of access).

Plaintiff contends that Chrissy's fundamental right of access to courts has been impermissibly abridged by various acts of Defendants in this matter. Specifically, Plaintiff asserts that the failure to timely institute proceedings in the proper judicial forum and the failure of various Defendants to investigate allegations of abuse and to present evidence of abuse to court officials constituted a denial of Chrissy's right to adequate, effective, and meaningful court proceedings.

a. jurisdictional issues as between chancery court and youth court

The primary argument advanced by Plaintiff in connection with the right of access to courts involves Plaintiff's contention that Judge Dale, by retaining chancery jurisdiction over the custody proceedings after allegations of child abuse had been made, prevented and/or delayed Chrissy's access to a youth court proceeding where Plaintiff claims

jurisdiction over proceedings involving an abused child properly lay.[62] Noting Mississippi law vests "exclusive original jurisdiction in all proceedings concerning . . . an abused child" with the youth court, see Miss. Code Ann. § 43-21-151 (1972), Plaintiff argues that Judge Dale had no jurisdiction over the abuse allegations when they were first raised in August, 1985. Because Judge Dale failed to refer the matter to the youth court at that time and, indeed, continued to entertain the custody proceedings and abuse allegations in chancery court through December, 1987, Plaintiff contends that Judge Dale impermissibly delayed Chrissy's right to meaningful and sufficiently prompt youth court proceedings. As a corollary to this argument, Plaintiff further contends that the Marion County Welfare Department and the Hancock County Welfare Department interfered with Chrissy's right of adequate, effective, and meaningful access to courts by delaying commencement of a youth court proceeding during the time that Judge Dale was purportedly exercising chancery jurisdiction over the abuse allegations.

Conversely, Judge Dale, the Marion County Welfare Department and the Hancock County Welfare Department assert that the chancery court is constitutionally and statutorily vested with the authority to hear a custody modification matter involving a minor with regard to whom it has previously issued custody decrees. Noting that the chancery court is constitutionally vested with full jurisdiction in divorce and alimony proceedings and is also statutorily authorized to issue all decrees pertaining to child custody disputes that may arise during the course of a divorce proceeding and to retain exclusive original jurisdiction over the custody issue once an original decree has been issued, these Defendants contend that the chancery court held exclusive jurisdiction over the custody proceeding in which abuse allegations were raised, thus negating the inference that chancery proceedings impermissibly delayed any right that Chrissy had to have the abuse allegations heard exclusively in youth court.

Upon an examination of relevant legal authority, the Court concludes that Chrissy's right of access to courts was not violated when

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[62]This subsection deals with the period of time before Chrissy's return from California during which Judge Dale was conducting visitation and custody hearings between Singley and Foxworth. The issue of whether the exercise of jurisdiction by the chancery court after Chrissy returned from California is addressed, infra, Section II.A(2)(b).

Judge Dale retained chancery jurisdiction over the custody proceedings in which allegations of abuse were made rather than transferring the matter to youth court. The Mississippi Constitution provides that the chancery court "shall have full jurisdiction" in divorce and alimony proceedings. Miss. Const. art. 6, §159. As a natural consequence of this constitutionally vested jurisdiction, chancery courts are statutorily authorized to issue all decrees pertaining to child custody disputes that may arise in the course of divorce proceedings.

> Where a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage. . . .

Miss. Code Ann. § 93-5-23 (1972). Once a chancery court obtains jurisdiction over the custody issue by issuing the original custody decree, it retains continuing jurisdiction over that issue and can issue subsequent modifications to that decree as any material change in circumstances may warrant. See Miss. Code Ann. § 93-5-23 (1972) (chancery court retains authority to modify previously issued custody decrees or to issue new decrees as required). Any hearings for custody modification that occur subsequent to the original custody proceedings are not considered separate and independent proceedings, but rather are supplementary to and operate as a continuation of the original chancery action. See Morris v. Morris, 245 So. 2d 22, 24 (Miss. 1971) (noting that jurisdiction over a custody modification hearing had attached in chancery court on the date that the original custody proceeding had taken place); Ladner v. Ladner, 206 So. 2d 620, 624-25 (Miss. 1968) (holding that jurisdiction obtained by chancery court over the custody issue is continuous in nature). Although section 93-5-23 does not expressly provide that the jurisdiction acquired by the chancery court under such circumstances is exclusive, the Mississippi Supreme Court has held that chancery jurisdiction over custody proceedings is continuous and exclusive, thus precluding any other state court from acquiring or exercising jurisdiction over the same subject matter. Ladner, 206 So. 2d at 624-25.

Based on the foregoing analysis, the Court concludes that the chancery court acquired exclusive, continuing jurisdiction over all

custody proceedings regarding Chrissy when the original custody decree was issued in November, 1984. The custody modification hearing that took place in August, 1985, at which allegations of sexual abuse were first raised was merely a continuation of the original custody action over which the chancery court continued to exercise exclusive jurisdiction. Under these particular circumstances, the Court concludes that, while Miss. Code Ann. § 43-21-151 (1972) states that the youth court shall have exclusive original jurisdiction over all proceedings concerning an abused child, that statute cannot be applied where exclusive jurisdiction over a proceeding involving allegations of abuse has already vested in a chancery court through a custody matter involving that child. The term "exclusive jurisdiction," as embodied in section 43-21-151, denotes the power which a court exercises over an action to the exclusion of all other courts. Black's Law Dictionary 507 (5th ed. 1979). Likewise, the term "original jurisdiction" as embodied in section 43-21-151 is defined as jurisdiction to take cognizance of a cause at its inception. Id. at 991. Where, as in the instant matter, allegations of abuse arise during proceedings over which a chancery court is already exercising continuous and exclusive jurisdiction, the Court finds that there is no opportunity for the youth court to exercise its exclusive original jurisdiction conferred under section 43-21-151 because the exclusive jurisdiction of another court has already precluded the ability of the youth court to take cognizance of the claim at its inception to the exclusion of all other courts. Alternatively stated, the Court finds that the exclusive original jurisdiction of the youth court to hear proceedings involving an abused child as conferred by section 43-21-151 does not apply and cannot be effectuated where the proceeding has already fallen under the exclusive jurisdiction of a chancery court.

Although dealing with statutory provisions that are not at issue in this lawsuit, the Mississippi Supreme Court in Reynolds v. Riddell, 253 So. 2d 834 (Miss. 1971) had occasion to consider how the continuous and exclusive nature of chancery jurisdiction affects the jurisdiction that may be statutorily conferred on other courts. In Reynolds, a custody decree that had been issued by one chancery court was subsequently modified by a decree from the chancery court of another county in which the child actually resided. Although a Mississippi statute expressly provided that custody issues could be determined by the chancery court of the county in which the child resided, the court found that the exclusive and continuous nature of the jurisdiction acquired by the court that had issued the original decree precluded application of the

statute. Reynolds, 253 So. 2d at 836. Because the inherent nature of chancery jurisdiction over custody issues did not allow such issues to be divested from the jurisdiction of the chancery court issuing the original decree, the Reynolds court concluded that the state statute allowing custody issues to be heard in the county where the child resided could only be applied where no prior chancery court adjudication existed. Id. at 836-37. Likewise, this Court concludes that, because of the continuous and exclusive nature of chancery jurisdiction over custody issues, section 43-21-151 which grants the youth court exclusive original jurisdiction over all proceedings involving an abused child can not be applied where allegations of abuse are raised in the course of custody proceedings and chancery court jurisdiction over the custody issue is already being exercised.[63]

Finally, the Court notes an amendment that has been made to the chancery jurisdictional statute which supports this Court's conclusion that chancery courts retain jurisdiction to hear abuse allegations where they are raised in the context of custody modification proceedings.

> Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Public Welfare . . . . The Department of Public Welfare shall investigate such allegation and take such action as it deems appropriate and as provided in such cases in the Youth Court Law . . . or under the laws establishing family courts.
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> If after investigation by the Department of Public Welfare or final disposition by the youth court or family court allegations of child abuse are found to be

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[63]This Court is not faced with and does not now decide the issue of whether a youth court can exercise jurisdiction over an abused child where that child has previously been the subject of a custody proceeding in chancery court, but the allegations of abuse do not arise in the context of a custody proceeding and the custody issue is not in an active status.

> without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

Miss. Code Ann. § 93-5-23 (Supp. 1991). Although this language was added to section 93-5-23 subsequent to the events of this case, the Court finds it instructive of legislative intent in dealing with situations similar to the one presently before the Court. Because this language clarifies the options a chancellor holds at his disposal when confronted with abuse allegations in the context of custody proceedings and makes it clear that the chancellor would be within the bounds of his judicial discretion in ordering the matter turned over to youth court officials, the Court finds that the amendatory language impliedly concedes that, in the first instance, the chancellor does indeed hold continuing, exclusive jurisdiction over custody proceedings even where allegations of child abuse have been made. The Court further notes that it finds the amendatory language to be a clarification of, rather than a substantive change to, section 93-5-23. If this language was intended to be a substantive change to section 93-5-23, it could be argued that, prior to the amendment, exclusive jurisdiction over these matters rested with the youth court. The Court finds that under such circumstances it would have been necessary to amend the youth court jurisdictional statute, section 43-21-151, in conjunction with section 93-5-23 to accomplish a substantive jurisdictional change. The Court notes, however, that section 43-21-151 was not amended at the time that the new language was added to section 93-5-23. Accordingly, the Court concludes that the amendment to section 93-5-23 was not intended to effect a jurisdictional change vis-a-vis chancery and youth courts, but rather was intended to clarify the nature of chancery jurisdiction which has always existed under section 93-5-23.

Based on the foregoing analysis, the Court concludes that the chancery court was exercising continuous, exclusive jurisdiction over a custody modification proceeding at the time that allegations of sexual abuse were first raised. The exclusive nature of that jurisdiction precluded application of Miss. Code Ann. § 43-21-151 (1972), which only grants the youth court exclusive original jurisdiction over proceedings involving an abused child. Because it would have been impossible for the youth court to exercise exclusive original jurisdiction over a proceeding which had already fallen under the exclusive

jurisdiction of the chancery court, the Court concludes that Chrissy had no right pursuant to section 43-21-151 to have the abuse allegations heard exclusively in youth court. The Court therefore finds that the failure to transfer proceeding from chancery to youth court upon the making of the initial allegation of abuse by Singley in a custody hearing did not interfere with Chrissy's right to adequate, effective, and meaningful access to courts and, accordingly, that Defendants Dale, the Marion County Welfare Department and the Hancock County Welfare Department did not violate Chrissy's constitutionally protected rights on this basis.

b. inaction and affirmative activity

In addition to the jurisdictional argument noted above, Plaintiff also asserts that Chrissy's right of access to courts has been violated by various acts of Defendants which resulted in a failure to investigate allegations of abuse, a failure to present all relevant evidence of abuse in the youth court proceeding, and a failure to ensure that the youth court hearing was an adequate, meaningful judicial procedure once employed.

Initially, the Court notes that many of the claims asserted by Plaintiff in this regard are based on Defendants alleged violations of the Mississippi Youth Court Law, Miss. Code Ann. § 43-21-101 et seq. However, a violation of state law, without more, does not establish an entitlement to relief under section 1983. See Kompare v. Stein, 801 F.2d 883, 888 (7th Cir. 1986). Clearly, section 1983 creates a federal cause of action only for the deprivation of a right secured by the United States Constitution or by federal law. Because issues of compliance with state law would be relevant in this context only to the extent that Chrissy is able to establish a Roth-type entitlement under substantive state law provisions, see Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Court concludes that all right of access arguments which find their genesis in state law are more properly analyzed as procedural due process claims, infra Section II.C.

The Court first considers a group of claims which assert violations of Chrissy's right of access to courts because of the failure of certain Defendants to take action which Plaintiff contends was necessary to secure Chrissy's constitutionally protected rights. Specifically, Plaintiff asserts that Defendants Douglas, Brittian, Lacy, Whitt, and Werbey failed to adequately investigate allegations that Chrissy had been sexually

abused. Plaintiff further contends that Defendants Dale, Douglas, and Brittian failed to disclose relevant evidence of sexual abuse during the youth court proceeding, all in violation of Chrissy's fundamental right of access to courts.

As this Court noted earlier in its analysis of Chrissy's liberty interest in remaining free from personal harm, the fourteenth amendment due process clause is a charter of negative rather than positive liberties. See Jackson v. Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (citing Harris v. McRae, 448 U.S. 297, 318 (1980); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)). As such, it serves to protect citizens from the affirmative acts of government. It does not function as a guarantee that basic services will be provided by state government, nor does it require state government to affirmatively assist particular individuals in securing those rights to which they are entitled under the Constitution.

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens . . . . The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . .
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> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney, 489 U.S. at 195-96 (citations omitted); see also Webster v. Reproductive Health Services, 492 U.S. 490, 507-08 (1989); Griffith v. Johnston, 899 F.2d 1427, 1438 (5th Cir. 1990).

Consistent with this reading of the due process clause, the Court concludes that state actors have no general duty to affirmatively aid individuals in securing their fundamental right of access to courts.

While a state certainly may not act to impede an individuals exercise of this fundamental right, this Court can find no precedent in right of access cases or in due process analysis generally which suggests that state actors must affirmatively act to secure an individual's rights as guaranteed under the fourteenth amendment. Accordingly, the Court concludes that, as to those claims asserting a deprivation of the right of access to courts based upon the failure of certain of the Defendants to take affirmative action on behalf of Chrissy, Plaintiff has failed to establish a right of recovery on that basis.

The Court next considers the category of claims through which Plaintiff asserts that Chrissy was deprived of her fundamental right of access to courts by the affirmative conduct of various Defendants. Initially, the Court notes that several of those claims relate to violations of the California court order which Plaintiff alleges have occurred. Specifically, Plaintiff alleges that Defendants Dale, Douglas, Brittian, Lacy, and Whitt failed to comply with specific mandates of the California court, the result of which was to deprive Chrissy of her right to adequate court proceedings upon her return to Mississippi. To the extent that Plaintiff's argument is premised upon the assertion that the mere failure to comply with a court order constitutes a violation of the right of access per se, the Court finds Plaintiff's premise untenable. The issue before this Court is whether Defendants have violated the constitutional standard for access to court proceedings, not whether Defendants have violated the particulars of a state court order.[64] Only where the conduct which is in violation of the state court order would also constitute a violation of the constitutional standard is this Court permitted to find that an injury cognizable under section 1983 has occurred.

Turning to the particulars of the conduct which Plaintiff alleges violated the California order and considering whether such conduct

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[64]To the extent that Plaintiff wishes to enforce particular provisions of the California court order, this Court notes that contempt proceedings in the forum issuing the order would be the appropriate remedy. While this Court would be compelled to address the issue of noncompliance with the California order in this section 1983 action if Plaintiff had asserted a constitutionally protected property interest in the particular provisions of the order, See Coffman v. Wilson Police Department, 739 F. Supp. 257, 264-65 (E.D. Pa. 1990), Plaintiff has not asserted any such claim, and that issue is therefore not properly before this Court.

violated constitutionally prescribed standards regarding the right of access, the Court concludes that Plaintiff has failed to establish any violation of Chrissy's rights on the basis of these particular acts.[65] With regard to acts which allegedly violated the provisions of the California order regarding physical and psychological evaluation of Chrissy and her placement in a neutral environment with no contact by her father upon her return to Mississippi, the Court finds that, even assuming violations of these provisions may have occurred, such acts did not affect or in any manner impinge upon Chrissy's right of access to courts. The Court finds that the issues addressed in these provisions of the order were in no way connected with or relevant to whether Chrissy received adequate access to a court proceeding. With regard to allegations that the Defendants failed to comply with the California provisions relating to the appointment of a guardian ad litem and the initiation of a youth court petition, the Court finds the evidence in this matter to establish that those conditions, while directly related to the issue of whether Chrissy had adequate, meaningful access to court proceedings, were in fact met. Accordingly, no violation of Chrissy's right of access occurred on this basis.

The Court next considers affirmative conduct surrounding the December 18, 1987, proceedings conducted by Judge Dale to determine whether such activity interfered with Chrissy's right of access to courts. As this Court has previously noted in its factual findings, Judge Dale issued a temporary order in the divorce proceedings on December 17, 1987, the day of Chrissy's return from California to Mississippi, which stated that the chancery court deemed it to be in Chrissy's best interest to have her physical, mental, and emotional state evaluated "by competent professionals and under the direction of the Court" prior to

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[65]A great deal of testimony taken in this action addressed the meaning of Judge Weinstein's order and Defendant's compliance with those directives. Defendants contend that Chrissy had been placed in a neutral setting upon her return to Mississippi (in Douglas' home), that she was physically and psychologically examined upon her return, that a guardian ad litem was appointed for her, that a youth court hearing was held, and that the order meant that no unsupervised contact with Chrissy by Foxworth was to be allowed until further court instructions were received. If this reading of the order is correct, the Court finds that, technically, there was compliance with the California order. Plaintiff, on the other hand, contended that Judge Weinstein intended for Chrissy to be isolated from Foxworth for an extended period of time during which extensive examinations would be performed.

physical custody of Chrissy being turned over to Foxworth. Judge Dale further ordered that it would be most expedient "to utilize the machinery of the Youth Court Division of this Court to accomplish the aforesaid purposes of examination and evaluation and possible treatment." Finally, Judge Dale ordered that the August 4, 1987, order granting Foxworth physical custody of Chrissy be held in abeyance until such time as the youth court had concluded its proceedings.

Concurrent with the actions being taken by Judge Dale in chancery court, other action related to Chrissy was being taken on December 17 in youth court by Defendant Garland Upton who served as the Marion County Youth Court referee. Referee Upton appointed Phillip W. Broadhead and Fred Cooper to serve as guardians ad litem for Chrissy in the youth court proceeding that had been initiated on December 16, 1987, with Judge Dale's approval. In addition, it was further ordered that temporary physical custody of Chrissy be placed in a private home approved by the youth court and that Chrissy be physically and psychologically examined.

On December 18, 1987, Chrissy was taken to Judge Dale's chambers where Dale ordered physical and psychological evaluations of Chrissy. Neither referee Upton nor the guardians ad litem Broadhead and Cooper were notified or present during this proceeding. At Judge Dale's direction, Chrissy was taken out of town for examination, and, upon her return to Columbia later that afternoon, Judge Dale placed Chrissy in the home of her paternal grandmother Hathorn, with unlimited visitation by Foxworth. No record or transcript exists for any of the proceedings that were conducted by Judge Dale on December 18, 1987.

Based on these factual findings, the Court concludes that Chrissy's right of access to court proceedings was violated by Judge Dale's continuing chancery court action in the custody matter past that point on December 16 when a youth court petition was filed on Chrissy's behalf. Specifically, the Court notes that on December 16, Judge Dale informed the California court that a youth court petition had been filed in Marion County Youth Court on Chrissy's behalf. In doing so, Dale impliedly conceded all jurisdiction that the chancery court held over the abuse issue and impliedly consented to have that issue and any remedial action necessary to address that issue determined by the youth court. By continuing to act in light of the relinquishment of chancery jurisdiction

and ordering examinations of Chrissy which served as a basis for a change in her legal and custodial status, Judge Dale interfered with Chrissy's right to have her interests adjudicated in a court of competent jurisdiction.

Alternatively, the Court finds that, even assuming Judge Dale did retain some form of jurisdiction which enabled him to issue the custody orders which were forthcoming on December 18, the proceedings which were utilized to issue such orders failed to provide Chrissy with adequate, meaningful access to a court proceeding. Specifically, the Court notes that Chrissy's guardians ad litem were not informed of nor present at the hearing and that no record was made of this proceeding from which an adequate appeal could have been made. On this basis, the Court concludes that the December 18 hearing conducted by Judge Dale did not adequately afford Chrissy an opportunity to protect her legal interests. Accordingly, the Court finds that, as an alternative to the jurisdictional defect noted above, this theory also supports a finding that Judge Dale violated Chrissy's right of access to courts.

Finally, the Court considers whether affirmative conduct by Defendant Upton during the December 30, 1987, youth court hearing violated Chrissy's right of access to courts. As the Court has previously noted, no record of this proceeding was ever made. The Court also notes that the final judgment issued as a result of that proceeding reflects that several crucial reports, namely those reports of Drs. Bradford, McCrary, and Russell which supported the allegation that Chrissy had been sexually abused, were never admitted into evidence nor were they considered by Upton in his final judgment. Based on these findings, as well as the inferences raised by the facts surrounding the youth court hearing which strongly suggest that the proceeding was little more than a pretext to facilitate the enforcement of chancery court orders which had previously been entered by Judge Dale, the Court concludes that Upton violated Chrissy's right of access to courts by subjecting her to a proceeding which fell woefully short of those basic features which mark an adequate adjudicatory proceeding. At a minimum, a complete record of this proceeding should have been made to ensure that an adequate appeal of the youth court judgment could have been made. The lack of a record in the youth court proceeding indicates to this Court a lack of substance to that proceeding and leads to the inescapable conclusion that Chrissy's right of access has been violated. Additionally, the Court finds that Upton failed to ensure that Chrissy was afforded meaningful

representation and should have been aware during the course of the youth court proceeding that the guardians ad litem were not sufficiently discharging their duties to their client or the court. While this Court does not suggest that Upton should be held accountable for the deficiencies in representation caused by the guardians ad litem themselves, it does hold Upton liable for continuing to adjudicate Chrissy's legal rights in light of the obvious lack of representation that was being afforded to a small child who was otherwise unable to protect herself. Accordingly, the Court finds that Defendant Upton violated Chrissy's right of access to courts.

C. PROCEDURAL DUE PROCESS CLAIMS

Plaintiff next asserts that the Youth Court Law, Miss. Code Ann. § 43-21-101 et seq., created legitimate and sufficiently vested property interests on behalf of Chrissy such that a deprivation of those interests without due process of law was constitutionally impermissible.

In analyzing procedural due process claims, the Court must consider whether a property interest inuring to the claimant's benefit does in fact exist. Baptist Memorial Hospital-De Soto, Inc. v. Mississippi Health Care Commission, 617 F. Supp. 686, 689 (S.D. Miss. 1985) (citing Lehe v. Robertson, 463 U.S. 248 (1983)). "Property" denotes a broad range of interests that are grounded in or defined by a source of authority independent of the due process clause itself. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

> The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except "for cause."

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982). In support of the contention that Chrissy has been deprived of certain vested interests she held under state law, Plaintiff notes particular provisions of the Youth Court Law which statutorily mandate the reporting and investigation of child abuse and which provide a procedural framework for the adjudication of such claims. In connection with reporting and investigating instances of child abuse, the Youth Court Law mandates that designated professionals and law enforcement officials, having reasonable cause to suspect that a child is neglected or abused "shall cause an oral report to be made immediately . . . and followed . . .

thereafter . . . by a report in writing" to the Mississippi Department of Public Welfare. See Miss. Code Ann. § 43-21-353 (1972). Upon receiving such a report, the Department of Public Welfare "shall" immediately refer the report to the "intake unit" and/or youth court prosecutor. Id. After receiving the report, the intake unit "shall promptly make preliminary inquiry to determine whether the interest of the child . . . requires the youth court to take further action." Id. § 43-21-357. In addition, the intake unit "shall immediately forward the complaint to the (Department of Public Welfare) to promptly make an investigation or report . . . and promptly present the findings thereof to the intake unit." Id. The intake unit must then recommend to the youth court whether further action should occur, and the youth court can then decide whether to follow those recommendations. Id.

Where it is determined that a youth court proceeding is necessary, the Youth Court Law states that the youth court "shall have exclusive original jurisdiction" in all proceedings involving an abused child, see id. § 43-21-151, and that, when "it is determined that [a person before another court] is a child under the jurisdiction of the youth court, such court shall . . . immediately dismiss the proceeding" and forward all documents to the youth court. Id. § 43-21-159. Where allegations of abuse are at issue, a youth court proceeding shall be commenced in the court where the child's custodian resides or in the county where the child is present when the report is made to the intake unit. Id. § 43-21-155(2). Further, "[n]o court other than the youth court shall issue . . . [a] custody order for a child in a matter in which the youth court has exclusive original jurisdiction but shall refer the matter to youth court." Id. § 43-21-301(1).

With regard to those procedural due process claims which have been asserted on the basis of the foregoing statutes involving investigatory functions and the initiation of youth court proceedings, the Court finds that Plaintiff has failed to establish that Chrissy was deprived of any property interest inuring to her benefit under these particular statutory provisions. Based upon the evidence presented in this matter, the Court finds that those Defendants who were charged under state law with a duty to investigate allegations of abuse and to attempt to initiate youth court proceedings if such action was deemed necessary did in fact comply with the statutory mandate. In this regard, the Court notes that this case presents a factual scenario that the Youth Court Law did not contemplate. Clearly, the reporting and investigatory scheme mandated

under the act contemplates that jurisdiction over allegations of abuse would rest with the youth court. As this Court has previously noted, however, the youth court did not have jurisdiction to act in this particular instance. Accordingly, much of the reporting and investigation that occurred in this matter was not and could not be used in the manner contemplated by the Youth Court Law. The Court finds that, under the circumstances confronting them, the welfare department personnel, Douglas, and any others responsible for reporting and investigating allegations of abuse of Chrissy substantially complied with their statutory duties. Indeed, the record reflects that many of the Defendants did their utmost to ensure that all relevant information was available to those individuals who had the authority to act in this matter. Accordingly, the Court finds that Plaintiff has failed to establish that Chrissy was deprived of any entitlements she held under these particular statutory provisions.

Plaintiff has also asserted a procedural due process claim on the basis the Defendant Upton failed to comply with state law regarding the manner in which youth court proceedings are to be conducted. Specifically, Plaintiff notes that the Youth Court Law provides that the "youth court shall appoint a guardian ad litem" for a child in every case involving an abused child. Miss. Code Ann. § 43-21-121(1)(d), (e) (1972). Each party to a youth court proceeding "shall have the right to be represented by counsel at all stages of the proceeding." Id. § 43-21-201. Further, "[i]n all [youth court] hearings . . . a complete record of all evidence shall be taken by stenographic reporting, by mechanical or electronic device or by some combination thereof," see id. § 43-21-203(7), and "all parties to a youth court cause shall have the right at any hearing in which . . . [a] report is admitted in evidence . . . to introduce evidence controverting the contents of the report." Id. § 43-21-203(9).

Upon an examination of the above cited statutes, the Court concludes that these provisions of the Youth Court Law create property interests which Chrissy may enforce under the due process clause. Where a state statute mandates that officials take certain affirmative actions to ensure the well-being and promote the welfare of a child, that child can state a due process claim based upon deprivation of a property interest where officials have failed to follow the statutory mandate. See Meador v. Cabinet for Human Resources, 902 F.2d 474, 476-77 (6th Cir. 1990); Taylor v. Ledbetter, 818 F.2d 791, 799-800 (11th Cir. 1987). Accordingly, the Court finds that, to the extent that Defendant

Upton failed to have a record made of the youth court proceeding, Chrissy was deprived of a property interest to which she was entitled under the fourteenth amendment. Additionally, the Court finds that, while Upton did appoint a guardian ad litem for Chrissy, he failed to ensure that her interests were adequately protected by that representation and effectively denied her right to present evidence on her behalf as established under Mississippi law. Accordingly, the Court concludes that Upton deprived Chrissy of a protected property interest on this basis as well.

D. CAPTA Claims

Plaintiff next asserts claims against various Defendants for alleged violations of certain provisions of the Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. § 5101 et seq. Plaintiff contends that CAPTA issues are properly before this Court on three bases. Initially, Plaintiff contends that CAPTA itself creates substantive rights and a private right of action that may be enforced under section 1983. Secondly, Plaintiff contends that CAPTA is applicable to this action because of its incorporation into Part B of Title IV of the Social Security Act, 42 U.S.C. § 620 et seq., which has traditionally been enforced through private rights of action. Finally, Plaintiff asserts that, in addition to rights created either directly under CAPTA or through its incorporation into Title IV, federal regulations promulgated pursuant to CAPTA independently give rise to substantive rights which may be enforced in this action.

A private litigant may state a cause of action under section 1983 for the deprivation of rights secured by a federal statute. Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987); Maine v. Thiboutot, 448 U.S. 1, 3-6 (1980). In order for an action to be properly maintained under such circumstances, however, it must be established that the federal statute in question does in fact create a "right, privilege or immunity" within the meaning of section 1983. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19 (1981); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 28 (1981).

CAPTA expressly authorizes the Secretary of Health and Human Services to provide grants to the states "for purposes of assisting the states in developing, strengthening, and carrying out child abuse and

neglect prevention and treatment programs." 42 U.S.C. § 5106a(a). In order to qualify for such assistance, states must comply with certain statutory requirements aimed at assuring that proper reporting, investigative, personnel, health care, and legal programs and procedures exist to protect and promote the interests of abused and neglected children. See 42 U.S.C. § 5106a(b).[66]

An examination of relevant legal authority reveals that other jurisdictions which have considered the issue raised by Plaintiff have split on the issue of whether substantive rights are created under CAPTA or Title IV of the Social Security Act, and, if so, the extent of the rights so created. Compare L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988) (Title IV creates an enforceable right to a properly implemented and operated case review system for foster children); Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983) (children under jurisdiction of foster care program had substantive right in case review system); Artist M. v. Johnson, 726 F. Supp. 690, 694 (N.D. Ill. 1989) (substantive right to case review system created under Title IV); Joseph A. v. New Mexico Department of Human Services, 575 F. Supp. 346, 353 (D. N.M. 1982) (private litigants may obtain declaratory and injunctive

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[66]As particularly relevant to the instant matter, 42 U.S.C. 5106a(b) provides:

> In order for a State to qualify for a grant under subsection (a) of this section, such State shall--
>
> (1) have in effect a State law relating a child abuse and neglect, including--
> (A) provisions for the reporting of known and suspected instances of child abuse and neglect;
>
> * * * * *
>
> (2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child[;]
>
> * * * * *
>
> (6) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings;

relief for violations of Title IV); with Scrivner v. Andrews 816 F.2d 261, 263 (6th Cir. 1987) (Title IV creates no right to meaningful visitation); B.H. v. Johnson, 715 F. Supp. 1387, 1401 (N.D. Ill. 1989) (Title IV creates no enforceable federal rights); Jensen v. Conrad, 570 F. Supp. 91, 113 (D. S.C. 1983) (neither Title IV nor CAPTA create any substantive rights that can be enforced by private litigants).

Based upon the record presented in this case, however, the Court concludes that it is not necessary to determine at this point whether Chrissy in fact has substantive rights by virtue of CAPTA, CAPTA inspired federal regulations, or Title IV of the Social Security Act. Plaintiff has failed to present any evidence which would suggest that the State of Mississippi has failed to comply with the funding conditions set out in section 5106a(b). At most, Plaintiff has challenged discretionary acts that were undertaken by various state officials and state employees with regard to particular decisions that were made in the course of handling Chrissy's case. While Plaintiff may in fact find these decisions objectionable, they simply offer no support to the contention that the programs and procedures mandated by section 5106a(b) have not been established. Accordingly, the Court finds that, even if it were to assume that substantive rights were created under CAPTA or Title IV which could be enforced here, Plaintiff has failed to produce any evidence which suggests that she would be entitled to prevail on such a claim.

E. Pendent State Law Claims

Plaintiff has also asserted certain pendent state law claims in this matter for assault and battery and negligence. At Plaintiff's request, see Plaintiff's Proposed Findings of Fact and Conclusions of Law at 3, the Court exercises its discretion and dismisses those claims without prejudice.

III.

REMEDIES

The prayer for relief in this matter requested declaratory, injunctive, and monetary relief. Because monetary damages were not sought against Defendants Dale and Upton, the only Defendants in this matter which have been found to have violated Chrissy's constitutional rights, no such award will be made.

Based on the foregoing findings of fact and conclusions of law, the Court concludes that declaratory relief should issue on the basis that both Defendants Dale and Upton have violated Chrissy's right of access to courts. Declaratory relief should also issue on the basis that Defendant Upton has violated Chrissy's procedural due process rights.

As to the matter of injunctive relief, Plaintiff has requested a wide range of relief which she contends is necessary to ensure that Chrissy is afforded her constitutionally protected rights. Many of the measures Plaintiff requests go beyond that amount of relief which the Court feels would be necessary to remedy past wrongdoing and ensure that Chrissy's interests are adequately protected. Accordingly, the Court finds that adequate relief can be afforded in this matter by enjoining Defendant Upton, in his capacity as youth court referee of Marion County, Mississippi to conduct a new hearing on Chrissy's behalf and re-examine the issue of whether she has been sexually abused and, if so, what action should be taken. Plaintiff has requested that this Court include in the order for injunctive relief specific directives regarding the manner in which the youth court hearing should be conducted. The Court, however, does not feel that this would appropriate at this time. Interference with the manner in which a state court conducts its proceedings and in which it exercises its discretionary authority on many matters which routinely arise during the course of any judicial proceeding is an extreme step and one which this Court would take only under the most compelling of circumstances. Accordingly, the Court will simply order a new youth court proceeding in this matter. The Court does expect, and this order implicitly requires, that the youth court proceeding will conform to all statutory requirements and constitutional protections to which Chrissy is entitled. If, at any point in carrying out the relief ordered by this Court, the youth court proceeding fails to conform to statutory and constitutional standards, Plaintiff remains free to petition the Court at that point for clarification or for additional injunctive orders.

IV.

CONCLUSION

The Court can ascribe no improper motive to any of the parties to this lawsuit. Each of the parties, at all times, appears to have had the best interests of Chrissy in mind. The nature of this proceeding has

necessarily dichotomized the parties to this controversy depending upon their own contentious evaluation of the ultimate fact at issue here, whether Chrissy was in fact sexually abused. The Court fears, however, that this issue will never be conclusively resolved. Some of the parties will always believe that Chrissy was abused, and others will always be convinced that she was not. Regardless, this nine year old girl has been and will continue to be the focus of court proceedings and the media spotlight for some time to come. Perhaps the end result will be a clarification of law which will make future litigation of the same issue for other children fairer and less disruptive than it has been for Chrissy.

IT IS THEREFORE ORDERED that a declaratory judgment be entered in favor of Plaintiff, declaring that Defendants Dale and Upton have deprived Chrissy Foxworth of her constitutionally protected right of access to courts.

IT IS FURTHER ORDERED that a declaratory judgment be entered in favor of Plaintiff, declaring that Defendant Upton has deprived Chrissy Foxworth of her procedural due process rights as guaranteed by the fourteenth amendment to the United States Constitution.

IT IS FURTHER ORDERED that Defendant Upton, in his capacity as youth court referee of Marion County, Mississippi, is hereby enjoined to conduct a new youth court proceeding for the benefit of Chrissy Foxworth regarding the allegations of sexual abuse.

IT IS FURTHER ORDERED that, pursuant to this Memorandum Opinion and Order, a separate Declaratory Judgment and Order for Injunctive Relief be entered in this cause.

SO ORDERED this the 6th day of December, 1991.

ss. William H. Barbour, Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

CHRISSY F., By Her Next Friend And Guardian Ad Litem, DONNA MEDLEY,

Plaintiff,

vs. *CIVIL ACTION NO. J88-0340(B),*

MISSISSIPPI DEPARTMENT OF PUBLIC WELFARE, THOMAS H. BRITTIAN, JR., Individually and as Commissioner of the Mississippi Department of Public Welfare; SEBE DALE, JR., Individually and as Chancellor for the Tenth Chancery Court District of Mississippi; GARLAND UPTON, Individually and as Referee of the Marion County Youth Court; RICHARD L. DOUGLAS, Individually and as District Attorney for Marion County, Mississippi; MARION COUNTY WELFARE DEPARTMENT; HANCOCK COUNTY WELFARE DEPARTMENT; JEANETTE WERBEY, as Supervisor of Hancock County Welfare Department; ANGELA LACY, Individually and as Caseworker for Marion County Welfare Department; PHILLIP BROADHEAD; FRED COOPER; TIMOTHY CHARLES FOXWORTH; SHARON WHITT, Individually and as Supervisor of Marion County Welfare Department; and LAMAR BRAXTON, CAROL BURGER, CAROLE HANEY, R.D.HARRIS, WILLIAM REED, KATHERIN SHEPARD, AND JESSIE WEEKS, in their official capacities as members of the State Board of Public Welfare

Defendants.

DECLARATORY JUDGMENT AND ORDER FOR INJUNCTIVE RELIEF

Pursuant to the Memorandum Opinion and Order entered in the above styled cause this day, this Declaratory Judgment and Order for Injunctive Relief is hereby entered.

IT IS THEREFORE ORDERED that Declaratory Judgment is hereby entered in favor of Plaintiff, declaring that Defendants Dale and Upton have deprived Chrissy Foxworth of here constitutionally protected right of access to courts.

IT IS FURTHER ORDERED that Declaratory Judgment is hereby entered in favor of Plaintiff, declaring that Defendant Upton has deprived Chrissy Foxworth of her procedural due process rights as guaranteed by the fourteenth amendment to the United States Constitution.

IT IS FURTHER ORDERED that Defendant Upton, in his capacity as youth court referee of Marion County, Mississippi, is hereby enjoined to conduct a new youth proceeding pursuant to the Mississippi Youth Court Law for the benefit of Chrissy Foxworth regarding the allegations of sexual abuse.

IT IS FURTHER ORDERED that all other named Defendants are hereby finally dismissed from this lawsuit.

SO ORDERED this the 6th day of December, 1991.

William H. Barbour, Jr.
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 92-7002

CHRISSY F., By Her Next Friend And Guardian Ad Litem, DONNA MEDLEY,

Plaintiff-Appellee
Cross-Appellant,

vs.

MS. DEPT OF PUBLIC WELFARE, ET AL.,

Defendants,

MS. DEPT. OF PUBLIC WELFARE, THOMAS H. BRITTAIN, JR., Individually and as Commissioner of the MS. Dept. of Public Welfare, MARION COUNTY WELFARE DEPARTMENT, HANCOCK COUNTY WELFARE DEPARTMENT, SHARON WHITT, Individually and as Supervisor of Marion County Welfare Department, ANGELA LACY, Individually and as Caseworker for Marion County Welfare Department, PHILLIP BROADHEAD and FRED COOPER,

Defendants-
Cross-Appellees,

SEBE DALE, JR., Individually and as Chancellor for the Tenth Chancery Court District of MS and GARLAND UPTON, Individually and in his capacity as Referee of the Marion County Youth Court,

Defendants-
Appellants
Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion Nov. 3, 1992. 5 Cir., ___, ___ F.2d ___)

(August 9, 1993)

Before DAVIS and JONES, Circuit Judges, and PARKER*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones
United States Circuit Judge

REHG-6

*Chief Judge from the Eastern District of Texas, sitting by designation

ORGANIZATION, ADMINISTRATION AND OPERATION

§ 43-21-101. Short title.

This chapter shall be cited as the "Youth Court Law."

SOURCES: Laws, 1979, ch. 506, § 1, eff from and after July 1, 1979.

§ 43-21-103. Construction and purpose.

This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the youth court shall receive such care, guidance and control, preferably in his own home, as will be conducive to the child's welfare and the best interest of the state, and that when a child is removed from the control of his parents, the youth court shall secure proper care for him.

SOURCES: Laws, 1979, ch. 506, § 2; 1980, ch. 550, § 1, eff from and after July 1, 1980.

§ 43-21-121. Guardian ad litem.

(1) The youth court shall appoint a guardian ad litem for the child:

(a) when a child has no parents, guardian or custodian;

(b) when the youth court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;

(c) when the parent is a minor or a person of unsound mind;

(d) when the parent is indifferent to the interest of the child or if the interests of the child and the parent, considered in the context of the cause, appear to conflict;

(e) in every case involving an abused or neglected child which results in a judicial proceeding; or

(f) in any other instance where the youth court finds appointment of a guardian ad litem to be in the best interest of the child.

(2) In addition to all other duties required by law, a guardian ad litem shall have the duty to protect the interest of a child for whom he has been appointed guardian ad litem.

(3) The court may appoint either a suitable attorney or a suitable layman as guardian ad litem.

(4) Upon appointment of a guardian ad litem, the youth court shall continue any pending proceedings for a reasonable time to allow the guardian ad litem to familiarize himself with the matter, consult with counsel and prepare his participation in the cause.

(5) Upon order of the youth court, the guardian ad litem may be paid a fee by the county out of the general fund.
SOURCES: Laws, 1979 ch. 506, § 11; 1980, ch. 550, § 5, eff from and after July 1, 1980.

§ 43-21-127. Cooperation.

It is hereby made the duty of every public official or department to render all assistance and cooperation within his or its jurisdictional power which may further the objects of this chapter. The youth court is authorized to seek the cooperation of all societies, organizations or agencies having for their object the protection or aid of children.
SOURCES: Laws, 1979, ch. 506, § 14, eff from and after July 1, 1979.

PROVISIONS APPLICABLE TO ALL PROCEEDINGS

§ 43-21-201. Representation by counsel.

(1) Each party shall have the right to be represented by counsel at all stages of the proceedings. If the party is a child, the child shall be represented by counsel at all critical stages. If indigent, the child shall have the right to have counsel appointed for him by the youth court.

(2) When a party first appears before the youth court, the judge shall ascertain whether he is represented by counsel and, if not inform him of his rights.

(3) An attorney shall enter his appearance on behalf of a party in the proceeding by filing a written notice of appearance with the youth court, by filing a pleading, notice or motion signed by counsel or by appearing in open court and advising the youth court that he is representing a party. After counsel has entered his appearance, he shall be served with copies of all subsequent pleadings, motions and notices required to be served on the party he represents. An attorney who has entered his appearance shall not be permitted to withdraw from the case until a timely appeal if any has been decided, except by leave of the court then exercising jurisdiction of the cause after notice of his intended withdrawal is served by him on the party he represents.
SOURCES: Laws, 1979, ch. 506, § 20; 1980, ch. 550, § 8, eff from and after July 1, 1980.

§ 43-21-203. Conduct of proceedings.

(1) The youth court shall be in session at all times.

(2) All cases involving children shall be heard at any place the judge deems suitable but separately from the trial of cases involving adults.

(3) Hearings in all cases involving children shall be conducted without a jury and may be recessed from time to time.

(4) All hearings shall be conducted under such rules of evidence and rules of court as may comply with applicable constitutional standards.

(5) No proceeding by the youth court in cases involving children shall be a criminal proceeding but shall be entirely of a civil nature.

(6) The general public shall be excluded from the hearing, and only those persons shall be admitted who are found by the youth court to have a direct interest in the cause or work of the youth court. Any person found by the youth court to have a direct interest in the cause shall have the right to appear and be represented by legal counsel.

(7) In all hearings, except detention and shelter hearings under section 43-21-309, a complete record of all evidence shall be taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

(8) The youth court may exclude the attendance of a child from a hearing in neglect and abuse cases with consent of the child's counsel. The youth court may exclude the attendance of a child from any portion of a disposition hearing that would be injurious to the best interest of the child in delinquency and children in need of supervision cases with consent of the child's counsel.

(9) All parties to a youth court case shall have the right at any hearing in which an investigation, record or report is admitted in evidence:

(a) to subpoena, confront and examine the person who prepared or furnished data for the report; and

(b) to introduce evidence controverting the contents of the report.

(10) Except as provided by section 43-21-561(5) or as otherwise provided by this chapter, the disposition of a child's cause or any evidence given in the youth court in any proceedings concerning the child shall not be admissible against the child in any case or proceeding in any court other than a youth court.

SOURCES: Laws, 1979, ch. 506, § 21; 1980, ch. 550, § 9, eff from and after July 1, 1980.

§ 43-21-261. Disclosure of records.

(1) Except as otherwise provided in this section, records involving children shall not be disclosed, other than to necessary staff of the youth court, except pursuant to an order of the youth court specifying the person or persons to whom the records may be disclosed, the extent of the records which may be disclosed and the purpose of the disclosure. Such court orders for disclosure shall be limited to those instances in which the youth court concludes in its discretion that disclosure is required for the best interests of the child, the public safety or the functioning of the youth court and then only to the following persons:

(a) the judge of another youth court or member of another youth court staff;

(b) the court of the parties in a child custody or adoption cause in another court;

(c) a judge of any other court or members of another court staff;

(d) representatives of a public or private agency providing supervision or having custody of the child under order of the youth court;

(e) any person engaged in a bona fide research purpose, provided that no information identifying the subject of the records shall be made available to the researcher unless it is absolutely essential to the research purpose and the judge gives prior approval; and

(f) the Mississippi Employment Security Commission, or its duly authorized representatives, for the purpose of a child's enrollment into the job corps training program as authorized by Title IV of the Comprehensive Employment Training Act of 1973 (29 investigations or information derived therefrom pertaining to child abuse or neglect shall be disclosed.

Law enforcement agencies may disclose information to the public concerning the taking of a child into custody for the commission of a delinquent act without the necessity of an order from the youth court. The information released shall not identify the child or his address.

(2) Any records involving children which are disclosed under an order of the youth court and the contents thereof shall be kept confidential by the person or agency to whom the record is disclosed except as provided in the order. Any further disclosure of any records involving children shall be made only under an order of the youth court as provided in this section.

(3) Upon request, the parent, guardian or custodian of the child who is the subject of a youth court cause or any attorney for such parent, guardian or custodian, shall have the right to inspect any record, report or investigation which is to be considered by the youth court at a hearing.

(4) Upon request, the child who is the subject of a youth court cause shall have the right to have his counsel inspect and copy any record, report or investigation which is filed with the youth court.

(5) The youth court prosecutor or prosectors, the county attorney, the district attorney, the youth court defender or defenders, or any attorney representing a child shall have the right to inspect any law enforcement record involving children.

(6) The judges of the circuit and county courts, any persons authorized by such judges, and pre-sentence investigators for the circuit courts, as provided in section 47-7-9, shall have the right to inspect any youth court records of a defendant which were made after his sixteenth birthday.

(7) The victim of an offense committed by a child who is the subject of a youth court cause shall have the right to be informed of the child's disposition by the youth court.

SOURCES: Laws, 1979, ch. 506, § 28, 1980, ch. 550, § 4, eff from and after July 1, 1980.

SUMMONS

§ 43-21-501. Persons on whom served.

(1) When a petition has been filed and the date of hearing has been set by the youth court, the judge or his designee shall order the clerk of the youth court to issue a summons to the following to appear personally at such hearing:

(a) the child named in the petition;

(b) the person or persons who have custody or control of the child;

(c) the parent or guardian of the child if such parent or guardian does not have custody of the child; and

(d) any other person whom the court deems necessary.

SOURCES: Laws, 1979, ch. 506, § 53, eff from and after July 1, 1979.

§ 43-21-557. Order of proceedings.

(1) At the beginning of each adjudicatory hearing, the youth court shall:

(a) verify the name, age and residence of the child who is the subject of the cause and ascertain the relationship of the parties, each to the other;

(b) ascertain whether all necessary parties are present and identify all persons participating int he hearing;

(c) ascertain whether the notice requirements have been complied with and, if not, whether the affected parties intelligently waived compliance in accordance with section 43-21-507;

(d) explain to the parties the purpose of the hearing and the possible dispositional alternatives thereof; and

(e) explain to the parties:

(i) the right to counsel;

(ii) the right to remain silent;

(iii) the right to subpoena witnesses;

(iv) the right to cross-examine witnesses testifying against him; and

(v) the right to appeal.

(2) the youth court should then ascertain whether the parties before the youth court are represented by counsel. If a party before the youth court is not represented by counsel, the youth court shall ascertain whether the party understands his right to counsel. If the party wishes to retain counsel, the youth court shall continue the hearing for a reasonable time to allow the party to obtain and consult with counsel of his choosing. If an indigent child does not have counsel, the youth court shall appoint counsel to represent the child and shall continue the hearing for a reasonable time to allow the child to consult with his appointed counsel.

(3) The youth court may then inquire whether the parties admit or deny the allegations in the petition as provided in section 43-21-553.

(4) The youth court may at any time terminate the proceedings and dismiss the petition if the youth court finds such action to be conducive to the welfare of the child and in the best interest of the state.

SOURCES: Laws, 1979, ch. 506, § 61, eff from and after July 1, 1979.

§ 43-21-559. Evidence admissible.

(1) In arriving at its adjudicatory decision, the youth court shall consider only evidence which has been formally admitted at the adjudicatory hearing. All testimony shall be under oath and may be in narrative form. In proceedings to determine whether a child is a delinquent child or a child in need of supervision, the youth court shall admit any evidence that would be admissible in a criminal proceeding. In proceedings to determine whether a child is a neglected child or an abused child, the youth court shall admit any evidence that would be admissible in a civil proceeding.

(2) An out-of-court admission by a the child, even if otherwise admissible, shall be insufficient to support an adjudication that the child is a delinquent child unless the admission is corroborated in whole or in part by other competent evidence.

(3) Members of the youth court staff may appear as witnesses except that no member of the youth court staff may testify as to an admission or confession made to him.

(4) At the conclusion of the evidence, the youth court shall give the parties an opportunity to present oral argument.

SOURCES: Laws, 1979, ch. 506, § 62, eff from and after July 1, 1979.

APPEALS

§ 43-21-651. Appeals to Supreme Court.

(1) The court to which appeals may be taken from final orders or decrees of the youth court shall be the supreme court of Mississippi. In any case wherein an appeal is desired, written notice of intention to appeal shall be filed with the youth court clerk within ten (10) days after the rendition of the final order of decree to be appealed from, and a costs in the youth court and the filing fee in the supreme court shall be paid as is otherwise required by law for appeals to the supreme court. If the appellant shall make affidavit that he is unable to pay such costs and filing fee, he shall have an appeal without prepayment of court costs and filing fee. Only the initials of the child shall appear ont he record on appeal.

(2) The pendency of an appeal shall not suspend the order or decree of the youth court regarding a child, nor shall it discharge the child from the custody of that court or of the person, institution or agency to whose care such child shall have been committed, unless the youth court or

supreme court shall so order. if appellant desires to appeal with supersedeas, the matter first shall be presented to the youth court. If refused, the youth court shall forthwith issue a written order stating the reasons for the denial, which order shall be subject to review by the supreme court. If the supreme court does not dismiss the proceedings and discharge the child, it shall affirm or modify or reverse the order of the youth court and remand the child to the jurisdiction of the youth court for placement and supervision in accordance with its order, and thereafter the child shall be and remain under the jurisdiction of the youth court in the same manner as if the youth court had made the order without an appeal having been taken.

(3) Appeals from the youth court shall be preference cases in the supreme court.

SOURCES: Laws, 1979, ch. 506, § 74, eff from and after July 1, 1979.